

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 180

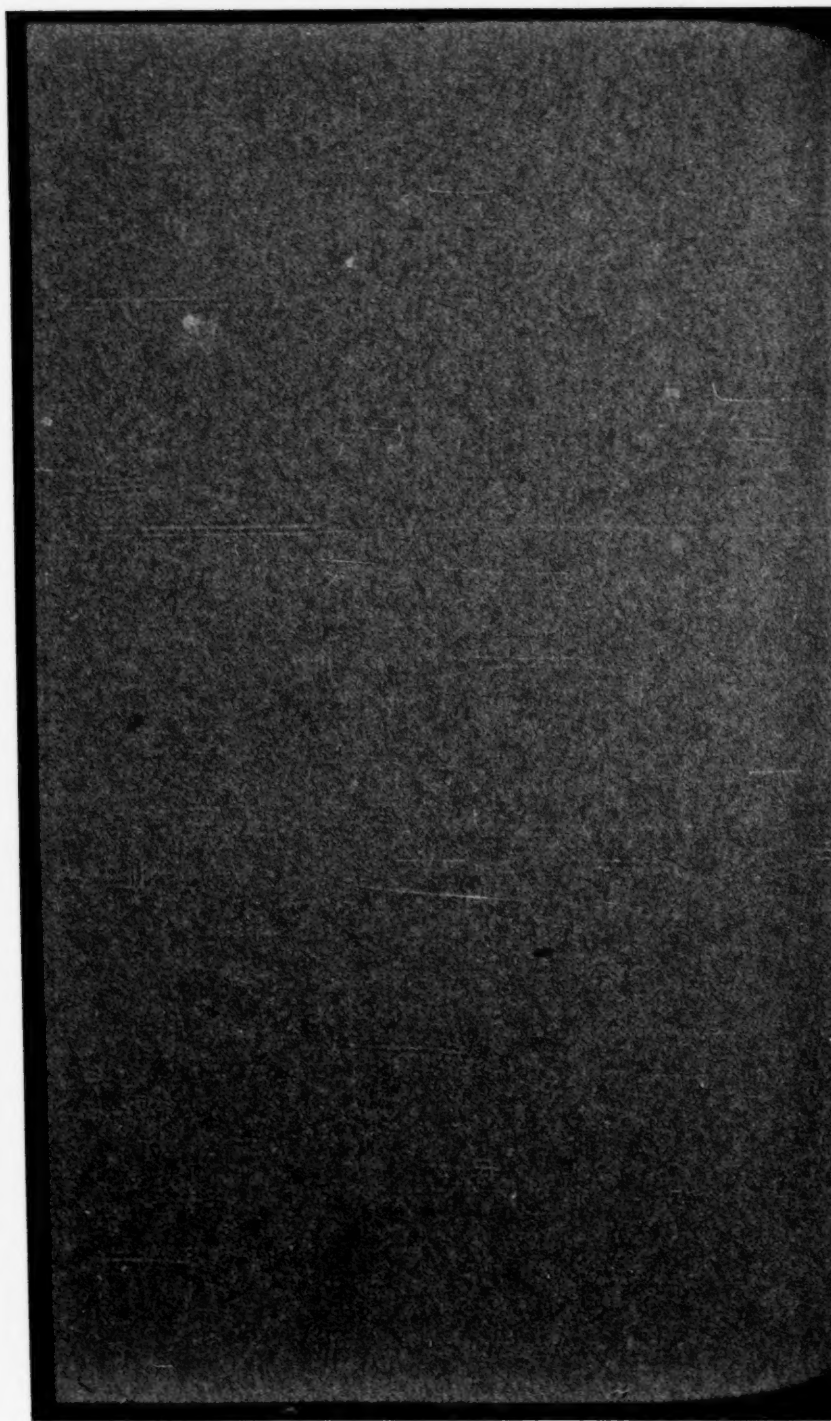
THE FIRST NATIONAL BANK OF GREELEY, PLAINTIFF IN
ERROR.

THE BOARD OF COUNTY COMMISSIONERS OF THE
COUNTY OF WELD.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLORADO.

FILED DECEMBER 11, 1923

(10,317)



(29,317)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 767.

THE FIRST NATIONAL BANK OF GREELEY, PLAINTIFF IN
ERROR,

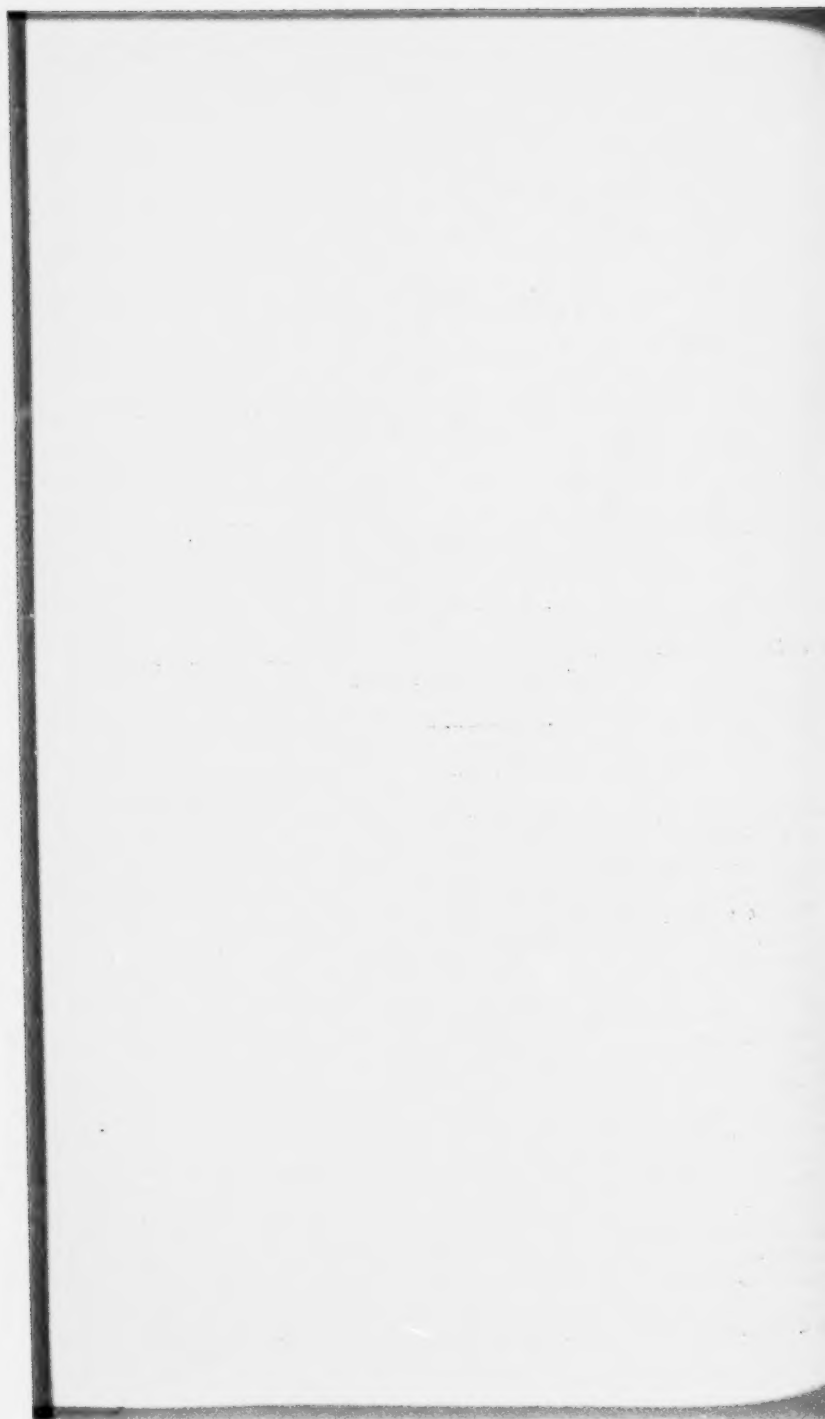
vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE
COUNTY OF WELD.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLORADO.

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7141.

Pleas in the District Court of the United States for the District of Colorado, Sitting at Denver.

Be it remembered, that heretofore and on to-wit: the eighth day of March A. D. 1921, came The First National Bank of Greeley, by Harry N. Haynes, Esquire, its attorney and filed in said court its complaint and sent out of and under the seal of said court a writ of summons against The Board of County Commissioners of the County of Weld.

And the said complaint is in words and figures as follows to-wit:

7141.

In the District Court of the United States for the District of Colorado.

Law Docket —, Case No. —.

THE FIRST NATIONAL BANK OF GREELEY, a National Banking Association, Acting for Itself and as Trustee for All Its Shareholders, Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, Defendant.

Complaint.

Filed Mar. 8, 1921. Charles W. Bishop, Clerk.

Plaintiff, The First National Bank of Greeley, comes by Harry N. Haynes, its attorney, and for Complaint against defendant as follows:

The amount involved in this case and the relief sought by plaintiff exceeds the sum of \$3,000.00.

Plaintiff's claimed right of recovery in each of its causes of action below stated, really and substantially involves rights which depend upon the construction and effect of the Constitution and a statute of the United States, viz:

(1) That sentence in Section 1 of Article XIV of Amendments to the Constitution of the United States which so far as applicable reads:

Nor shall any state deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

(2) A provision of Section 5219 of The Revised Statutes of the United States pertaining to taxation of property of national banks that the taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such state.

3 Plaintiff further avers:

For First Cause of Action.

I.

Plaintiff is and at all times herein mentioned has been a national banking association duly organized as such pursuant to the Acts of Congress in that behalf, with its place of business at Greeley in the County of Weld in the State and District of Colorado.

II.

By statute in Colorado the valuation of property for taxation is determined by its value on the first day of April of each calendar and fiscal year.

III.

On the first day of April, A. D. 1913, the full cash and market value of all the net assets of plaintiff bank correctly shown by its books and its report to the Comptroller of the Currency was a trifle less than and did not exceed \$239,000.00, which was then the sum of its capital stock, its surplus and its undivided profits.

IV.

On to-wit, the 11th day of June, A. D. 1913, plaintiff's cashier, conforming (save for deferred date) to Section 5756 of The Revised Statutes of Colorado of 1908, delivered to the assessor of said

4 Weld County plaintiff's verified statement showing the correct condition of plaintiff's assets as they existed on April 1 of that year, and that the full cash and market value thereof was and did not exceed \$239,000.00. Said statement accorded with one of like tenor showing the condition of plaintiff bank at close of business on April 4, 1913, which had been forwarded to the Comptroller of the Currency.

V.

The assessor of said Weld County thereupon in the summer of the year 1913 extended on the assessment roll of said Weld County as the assessed valuation of all of plaintiff's property for said calendar and fiscal year the sum of \$239,000.00, which was the full cash and market value thereof.

VI.

The County Board of Equalization of said Weld County at its meeting in September, A. D. 1913, made no change in said assessed valuation of plaintiff's property for said calendar and fiscal year.

VII.

Before the meeting of said County Board of Equalization in September, A. D. 1913, the assessor of said Weld County in due time made and transmitted to The Colorado Tax Commission an abstract of the real and personal property in said Weld County, setting forth the valuation thereof, which resulted in the assessments of real estate made by him and on personal property as listed by
5 the several tax payers with additions made by him, which abstract as corrected before it was considered by said The Colorado Tax Commission, showed:

Total assessment made through assessor's office.....	\$37,214,710
Assessment of property initially assessed by said The Colorado Tax Commission (such as railroads, etc.)	16,474,330
Total	\$53,689,040

VIII.

Thereafter, to-wit, in the month of October, 1913, said The Colorado Tax Commission without deciding or determining that the assessed valuation of plaintiff's property or of the property of other banks in said Weld County had been under assessed by said assessor and by the statements of plaintiff and said other banks, assumed to determine that the assessed valuation of the aggregate of all property in said Weld County shown by said abstract reported by said assessor as corrected by him, exclusive of property initially assessed by said The Colorado Tax Commission, was less than the full true cash and market value of the totality of property so assessed, and that a horizontal raise or increase of 63 per cent., in the opinion of said The Colorado Tax Commission, was necessary to reach the correct assessed valuation of the totality of said property. Thereupon said The Colorado Tax Commission transmitted to the State Board of
6 Equalization its said determination, specifying and recommending that the sum of \$23,447,440, being a raise of 63 per cent., should be a horizontal raise added to the assessed valuation of all taxable property in said county, exclusive of railroad and like property which has been assessed initially by said The Colorado Tax Commission.

IX.

Thereafter on the 22nd day of October, 1913, the State Board of Equalization of the State of Colorado adopted said determination and recommendation of said The Colorado Tax Commission, and by reso-

lution of said board assumed to direct that the assessed valuation of all the real and personal property in said Weld County other than that initially assessed by said The Colorado Tax Commission should be raised up to..... \$60,662,150
 leaving unchanged the valuation of railroads, public utilities, etc., as initially assessed by said The Colorado Tax Commission, viz..... 16,474,330

Making a total of..... \$77,136,480

X.

From the very nature of said action of said The Colorado Tax Commission and said The State Board of Equalization in recommending and ordering said horizontal raise, no opportunity to be heard to have such injustice corrected at that stage of the proceedings by administrative officials incident to the final preparation of the tax roll of said Weld County for said fiscal year 1913, was afforded to plaintiff or to the other banks in said Weld County, the property of which was thereby assumed to be ordered to be assessed at a sum 63 per cent. in excess of its full cash and market value.

XI.

On the 22nd day of October, 1913, said State Board of Equalization gave written notice of said resolution to the assessor of said Weld County and directed him to change the assessment roll thereof for the fiscal year 1913 by adding 63 per cent. to the assessed valuation of all property initially assessed through his office as shown by the corrected abstract referred to in paragraph VII hereof. Said The Colorado Tax Commission gave said assessor similar notice and direction on the same day.

XII.

Thereafter said assessor, following said directions, changed accordingly the assessment roll of said county so that as finally revised and delivered to the county treasurer of said county with the assessor's warrant for collection thereof on or about the 1st day of March, A. D. 1914, there was extended on the tax roll of said county as final assessment of all the assets of plaintiff \$388,760.00.

Said assessment so extended on the tax roll exceeded by \$149,760.00 the full book and cash value of all the shares of stock of plaintiff and exceeded by said sum the full cash and market value of all plaintiff's net assets existing on the 1st day of April, A. D. 1913.

XIII.

The aggregate levies made by the several taxing authorities applicable to the territory wherein plaintiff's said property was situated amounted to 16.8 mills.

By virtue of said assessment the tax imposed against plaintiff on said tax roll was made to appear as \$6,531.17

Said mill levy applied to the full actual value of plaintiff's assets made a total tax to which plaintiff was justly liable 4,015.20

The erroneous part of the tax so imposed was \$2,515.97

XIV.

Assessors in other counties in the State of Colorado during said fiscal year of 1913 followed the same rule relative to bank property in their initial assessment thereof as did the assessor of said Weld County, but said The Colorado Tax Commission did not recommend nor did the State Board of Equalization direct any increase or raise approximating 63 per cent. in any other county. In Larimer

County and in many others no horizontal increase whatever was imposed. In Boulder County the directed horizontal increase was only 3.7 per cent. In sundry other counties the directed horizontal increase varied from 3.7 per cent. to 40 per cent.

XV.

Said action of said The Colorado Tax Commission and said The State Board of Equalization caused an extension on the tax rolls of the different counties in the State of Colorado of an unequal and varying assessed valuation of the property of banks and of bank shares and in said Weld County a grossly excessive and erroneous assessment of their property over that of like property elsewhere in Colorado. With said 63 per cent. horizontal raise or increase, the final assessment imposed and extended on the tax rolls of said Weld County for the fiscal year 1913 for other classes of property in said county and the initial assessment imposed upon railroads, public utilities and the like by The Colorado Tax Commission which was not raised, constituted a fair approximation to the full market value thereof but upon plaintiff and the other banks of said county it constituted an excess of over full just value for taxation of 63 per cent. of full fair cash value.

Said action of said administrative boards and of said officials, if not later corrected by a refund of the erroneous and excessive portion of said tax imposed upon plaintiff as herein prayed, is contrary to that provision of Section 3, Article X of the Constitution of the State of Colorado which provides

All taxes * * * shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property.

By reason thereof, if said erroneous and excessive tax be not refunded as prayed herein, the State of Colorado by its officials acting under color of its legislation, will deny to plaintiff in said matter the equal protection of the laws and will be permitted to deprive

plaintiff of property without due process of law, contrary to the provision of Section 1, Article XIV of Amendments to the Constitution of the United States.

XVI.

The resolution of the State Board of Equalization on recommendation of The Colorado Tax Commission ordering varying horizontal increase of assessments reported by the assessors in sundry counties and no horizontal raise of assessed valuation in other counties, did not constitute equalization of assessments in the State of Colorado, but assumed to increase the total assessments of said state to the amount of 187 millions of dollars.

XVII.

The levy imposed for all purposes of the State of Colorado, including state institutions and the like, for the fiscal year, 11 1913, was 1.3 mills. Said levy when applied to the erroneous increase of assessed valuation of plaintiff's taxable property in excess of its full cash value and market value is \$194.69. Inasmuch as there was no increase in assessed valuation of property of banks and other monied capital in numerous other counties of the state which had been initially assessed upon the same basis as that of plaintiff, the imposition of said excessive tax if not refunded, will deprive plaintiff and its shareholders of rights protected by Section 5219 of The Revised Statutes of the United States and particularly the provision thereof referring to taxation of national banks which so far as applicable reads:

that the taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such state

XVIII.

On, to-wit, the 29th day of April, A. D. 1914, pursuant to Section 5, page 528, Colorado Session Laws of 1913, plaintiff filed in triplicate, with defendant, its petition for abatement and rebate of said \$2,515.97 of erroneous and excessive taxes imposed, stating in substance as grounds therefor the matters hereinabove set forth.

Before hearing of said petition for abatement and rebate, notice thereof and opportunity to be present was given to the assessor of said

Weld County as required by said Section 5 of said statute.

12 Said petition, in triplicate, was delivered to said assessor and by him returned to defendant with his recommendation in favor of granting its prayer.

Thereafter on the 12th day of May, A. D. 1914, defendant, at a duly adjourned meeting thereof, certified said petition with its approval thereof to The Colorado Tax Commission for its approval or disapproval. Thereafter said Commission returned said petition to said county board with its endorsement thereof of its disapproval thereof, stating no reasons or grounds for its action in that behalf.

XIX.

Said petition for an abatement and rebate of said \$2,515.97 of said erroneous and excessive tax was the first opportunity afforded plaintiff under the statutes of the State of Colorado to seek redress in said matter. The only remaining opportunity is for the defendant herein. The Board of County Commissioners of the County of Weld, to order a refund when it shall be judicially found that payment under protest by plaintiff of said portion of said tax with interest and costs imposed thereon was erroneous and illegal pursuant to Section 5750 of The Revised Statutes of Colorado of 1908 which so far as applicable reads:

where any person shall pay any tax, interest or cost, or any portion thereof, that shall thereafter be found to be erroneous or
13 illegal, the board of county commissioners shall refund the same without abatement or discount to the taxpayer.

XX.

Thereafter, during the year 1914, plaintiff paid to the treasurer of said Weld County the sum of \$4,015.20, being the full amount of the total mill levies assessed against the actual full and fair valuation of its taxable property in said county as initially correctly assessed by the assessor of said county; and thereafter on the 8th day of March, A. D. 1915, paid to said county treasurer under protest the sum of \$2,717.24, being the said excessive tax so wrongfully imposed with claimed interest and penalties based on failure to make said payment earlier.

XXI.

On the 18th day of February, A. D. 1921, plaintiff presented to and filed with defendant in the office of its secretary its claim and demand for audit and allowance of said taxes, interest and penalties so paid under protest, and presented to defendant its demand for refund to it of said sum of \$2,717.24 because of said payment under protest of said erroneous and excessive imposed taxes for the fiscal year 1913 with interest and penalties in accordance with Section 5750 of The Revised Statutes of Colorado of 1908, and filed its application for said refund with defendant on said day, in triplicate, and delivered to the assessor of said Weld County a notice
14 of said filing and in all respects conformed to the requirements of Section 5, page 528, Colorado Session Laws of 1913 in that behalf.

XXII.

Defendant has not paid or refunded to plaintiff or ordered payment or refund to plaintiff of said \$2,717.24 or any part thereof.

For Second Cause of Action.

I.

Plaintiff adopts and by reference makes a part of this cause of action the averments in paragraphs I. and II. of the first cause of action herein.

II.

On the first day of April, A. D. 1914, the full cash and market value of all the net assests of plaintiff bank correctly shown by its books and its report to the Comptroller of the Currency was \$231,744.00, which was then the sum of its capital stock, its surplus and its undivided profits.

III.

In due time in the spring of the year 1914, plaintiff's cashier conforming to Section 5756 of The Revised Statutes of Colorado of 1908, delivered to the assessor of said Weld County plaintiff's verified statement showing the correct condition of plaintiff's assets
15 as they existed on April 1 of that year, and that the full cash and market value thereof was and did not exceed \$231,744.00.

IV.

The assessor of said Weld County thereupon in the summer of the year 1914 in the first instance correctly extended on the assessment roll of said Weld County as the assessed valuation of all of plaintiff's property for said calendar and fiscal year the sum of \$231,744.00, which was the full cash and market value thereof. No change in said assessment was made by the County Board of Equalization of said county.

V.

Before the meeting of the County Board of Equalization of said Weld County in September, 1914, said assessor made and transmitted to The Colorado Tax Commission an abstract of the real and personal property in said Weld County, setting forth the valuation thereof, according to the assessments of real estate made by him and on personal property as listed by the several taxpayers, with additions made by him.

VI.

Thereafter, to-wit, in the month of October, 1914, said The Colorado Tax Commission determined that the total assessed valuation of all the property in said Weld County as shown by said
16 abstract of property reported by said assessor as corrected was less than the full and true value of the totality of property

so assessed, and that a horizontal raise or increase of 25 per cent. in the opinion of said The Colorado Tax Commission, was necessary to reach its true cash value. Thereupon said The Colorado Tax Commission transmitted to The State Board of Equalization its said determination.

VII.

Thereafter, to-wit, in the month of November, 1914, The State Board of Equalization of the State of Colorado adopted said determination and recommendation of said The Colorado Tax Commission, and by resolution of said board assumed to direct that the assessed valuation of all the real and personal property in said Weld County other than that initially assessed by The Colorado Tax Commission, should be raised 25 per cent.

VIII.

In so recommending and ordering said horizontal raise, from the very nature of said action no opportunity to be heard was afforded to plaintiff or to the other banks in said Weld County, the property of which was thereby assumed to be ordered to be assessed as a sum 25 per cent. in excess of its full cash and market value.

17

IX.

Thereupon said state board promptly gave written notice of said resolution to the assessor of said Weld County and directed him to change the assessment roll thereof for the fiscal year 1914 by making a 25 per cent. increase in the valuation of all property assessed through his office as revised by the County Board of Equalization and as shown by the corrected abstract referred to in paragraph V. hereof. Said The Colorado Tax Commission gave said assessor similar notice and direction at the same time.

X.

Thereafter said assessor, following said directions, changed accordingly the assessment roll of said county so that as finally revised and delivered to the county treasurer of said county with the assessor's warrant for collection thereof prior to the 1st day of March, A. D. 1915, there was extended on the tax roll of said county as final assessment of all the assets of plaintiff \$289,680.00 for the fiscal year 1914.

XI.

The aggregate levies made by the several taxing authorities applicable to the territory wherein plaintiff's said property was situated amounted to 19.1 mills.

By virtue of said assessment the tax imposed against plaintiff on said tax roll was made to appear as		\$5,532.88
Said mill levy applied to the full actual value		
18	of plaintiff's assets made a total tax to which plaintiff was justly liable	4,426.30
The erroneous part of the tax so imposed was		\$1,106.58

XII.

Assessors in other counties in the State of Colorado during said fiscal year of 1914 followed the same rule relative to bank property in their initial assessment thereof as did the assessor of said Weld County, but said The Colorado Tax Commission did not recommend nor did The State Board of Equalization direct any increase or raise approximating 25 per cent. in any other county. In Larimer County and in many others no horizontal increase whatever was imposed.

XIII.

Said action of said The Colorado Tax Commission and said The State Board of Equalization caused an extension on the tax rolls of the different counties in the State of Colorado of an unequal and varying assessed valuation of the property of banks and of bank shares and in said Weld County a grossly excessive and erroneous assessment of their property over that of like property elsewhere in Colorado. With said 25 per cent. horizontal raise or increase, the final assessment imposed and extended on the tax rolls of said Weld County for the fiscal year 1914 for other classes of property in said county and the initial assessment imposed upon railroads, public utilities and the like by The Colorado Tax Commission which

19 was not raised, constituted a fair approximation to the full market value thereof but upon plaintiff and the other banks of said county it constituted an excess of over full just value for taxation of 25 per cent. of full fair cash value.

Said action of said administrative boards and of said officials, if not later corrected by a refund of the erroneous and excessive portion of said tax imposed upon plaintiff as herein prayed, is contrary to that provision of Section 3, Article X of the Constitution of the State of Colorado which provides

All taxes * * * shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property.

By reason thereof, if said erroneous and excessive tax be not refunded as prayed herein, the State of Colorado by its officials acting under color of its legislation, will deny to plaintiff in said matter the equal protection of the laws and will be permitted to deprive plaintiff of property without due process of law, contrary to the provision of Section 1, Article XIV of Amendments to the Constitution of the United States.

XIV.

20 The levy imposed for all purposes of the State of Colorado, including state institutions and the like for the fiscal year 1914, was 1.39 mills. Said levy when applied to the erroneous increase of assessed valuation of plaintiff's taxable property in excess of its full cash value and market value is \$80.53. Inasmuch as there was no increase in assessed valuation of property of banks and other monied capital in numerous other counties of the state which had been initially assessed upon the same basis as that of plaintiff, the imposition of said excessive tax, if not refunded, will deprive plaintiff and its shareholders of rights protected by Section 5219 of The Revised Statutes of the United States and particularly the provision thereof referring to taxation of national banks which so far as applicable reads:

that the taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such state.

XV.

Thereafter in due time during the year 1915, plaintiff paid to the treasurer of said Weld County the sum of \$4,426.30, being the full amount of the total mill levies assessed against the actual full and fair valuation of its taxable property in said county as initially correctly assessed by the assessor of said county, and during said year paid to said county treasurer under protest the sum of \$1,106.58 (\$553.29 thereof on March 9th, and \$553.29 thereof on July 31st of said year) being the said excessive and erroneous tax so wrongfully imposed.

21

XVI.

On the 18th day of February, A. D. 1921, plaintiff presented to and filed with defendant in the office of its secretary its claim and demand for audit and allowance of said erroneous taxes, so paid under protest, and presented to defendant its demand for refund to it of said sum of \$1,106.58 because of said payment under protest of said erroneous and excessive imposed taxes for the fiscal year 1914, in accordance with Section 5750 of The Revised Statutes of Colorado of 1908, and filed its application for said refund with defendant on said day, in triplicate, and delivered to the assessor of said Weld County a notice of said filing and in all respects conformed to the requirements of Section 5, page 528, Colorado Session Laws of 1913 in that behalf.

XVII.

Defendant has not paid or refunded to plaintiff or ordered payment or refund to plaintiff of said \$1,106.58 or any part thereof.

Wherefore, plaintiff prays for judgment of this Honorable Court that it have and recover from the defendant the sum of \$3,823.82, viz., \$2,717.24 on its first cause of action and \$1,106.58 on its second cause of action, and for costs.

HARRY N. HAYNES,
Attorney for Plaintiff.

22 STATE OF COLORADO,
County of Weld, ss:

John M. B. Petrikin, of lawful age, being first duly sworn, on oath, says: I am President of The First National Bank of Greeley, a national banking association duly organized under the Acts of Congress in that behalf. I have read the above and foregoing complaint and well know the contents thereof. All and singular the matters and facts therein averred and set forth are true to my best knowledge and belief and I verily believe each and all of them to be true.

JOHN M. B. PETRIKIN.

Subscribed and sworn to before me this 7th day of March A. D. 1921.

My notarial commission expires January 16, 1924.

[Notarial Seal.]

THOMAS V. GRANTHAM,
Notary Public.

Summons.

Filed Mar. 9, 1920. Charles W. Bishop, Clerk.

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

23 In the District Court of the United States for the District of Colorado, Sitting at Denver.

No. 7141.

THE FIRST NATIONAL BANK OF GREELEY, a National Banking Association, Acting for Itself and as Trustee for all its Shareholders, Plaintiff,

versus

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD,
Defendant.

Complaint Filed in the Clerk's Office This Eighth Day of March, A. D. 1921.

The President of the United States of America to the defendant above named, Greeting:

You, are hereby notified that an action has been brought in said court, by the above named plaintiff, against you as defendant to re-

cover the sum of Three Thousand Eight Hundred Twenty-Three and 82/100 (\$3,823.82) Dollars, due the plaintiff from the defendant for certain excessive, and erroneous taxes paid to the Treasurer of Weld County in the year 1915, and for costs of suit, as more fully set forth and described in the complaint filed herein and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within thirty days (exclusive of the day of service) after this summons shall be served on you, and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint.

Witness, the Honorable Robert E. Lewis, Judge of the district court of the United States, for the district of Colorado, and the seal of said court, at the city and county of Denver, in said district, this eighth day of March, A. D. 1921, and of the Independence of the United States, the 145th year.

[Seal U. S. District Court.]

CHARLES W. BISHOP,
Clerk,
By ALBERT TREGO,
Deputy Clerk.

Denver, Colorado, March 9, A. D. 1921.

I hereby certify, That I received the within writ on the 8th day of March A. D. 1921, and that I have personally served the same upon the said defendant The Board of County Commissioners of the County of Weld by delivering to Charles E. Littell, Clerk of the Board of County Commissioners, personally, a true copy of the within writ, at the time and place as follows: As to The Board of County Commissioners of the County of Weld at Greeley county of Weld on the 8th day of March, A. D. 1921. As to—

S. J. BURRIS,
Marshal,
By CHAS. E. GOODFRIEND,
Deputy Marshal.

Marshal's Fees:

Service, 1 Defendants, at \$2.....	\$2.00
Mileage, — miles, at 6¢, going only.....
Expense	4.96
Total	\$6.96

HARRY N. HAYNES,
Attorney for plaintiff.
Greeley, Colo.

14 1ST NAT. BK., GREELEY, VS. COMRS., CO. OF WELD.

25 Endorsed: Received U. S. Marshal's Office Mar. 8, 1921.

Civil Docket, No. 5528.

7141.

In the District Court of the United States for the District of Colorado.

Law Docket, Case No. 7141.

THE FIRST NATIONAL BANK OF GREELEY, a National Banking Association, Acting for Itself and as Trustee for All Its Shareholders,
Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD,
Defendant.

Demurrer.

Filed Apr. 18, 1921. Charles W. Bishop, Clerk.

Comes now the defendant by its attorneys and demurs to the complaint herein:

I.

To the first cause of action, on the ground that said complaint does not in said cause of action allege facts sufficient to constitute a cause of action against the defendant.

26

II.

To the second cause of action, on the ground that said complaint does not in said cause of action allege facts sufficient to constitute a cause of action against the defendant.

III.

To both causes of action, on the ground that the complaint does not allege facts sufficient to constitute a cause of action against the defendant.

WILLIAM R. KELLY,
Attorney for Defendant.

VICTOR E. KEYES,
Attorney General;
CHARLES ROACH,
Deputy Attorney General,
of Counsel.

Fifty-third Day, May Term, Friday, October 7th, A. D. 1921.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the third day of May, A. D. 1921.

And before the Honorable John E. Carland, Circuit Judge, assigned to hold the District Courts of the United States for the Eighth Judicial Circuit, the following proceeding was had:

7141.

THE FIRST NATIONAL BANK OF GREELEY, a National Banking Association, Acting for Itself and as Trustee for All Its Shareholders,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD.

Money Demand.

27 The demurrer to the complaint in the above entitled action came on for hearing before the court at Denver, Colorado, on this thirty-first day of August, A. D. 1921. The court after listening to the argument of counsel took the matter under advisement and now on this seventh day of October, A. D. 1921, it is ordered and adjudged that the demurrer of the complaint be and the same is hereby sustained.

Fourth Day, November Term, Thursday, November 10th, A. D. 1921.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the first day of November, A. D. 1921.

7141.

THE FIRST NATIONAL BANK OF GREELEY, a National Banking Association, Acting for Itself and as Trustee for All Its Shareholders,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD.

Money Demand.

At this day comes the plaintiff by Harry N. Haynes, Esquire, its attorney. And the motion of the plaintiff for leave to file herein an amended complaint coming on now to be heard, is submitted to the court. And the court having considered the same and being now fully advised in the premises,

It is ordered by the court for good and sufficient reasons to the court appearing, that said motion be, and the same is hereby, 28 granted. And that the plaintiff may file an amended complaint herein instanter. Which is accordingly done.

It is further ordered by the court that the defendant plead, answer or demur to said amended complaint within fifteen (15) days from this day.

7141.

In the District Court of the United States for the District of Colorado.

Law Docket, Case No. 7141.

THE FIRST NATIONAL BANK OF GREELEY, a National Banking Association, Acting for Itself and as Trustee for All Its Shareholders, Plaintiff,

VS.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, Defendant.

Amended Complaint.

Filed Nov. 10, 1921. Charles W. Bishop, Clerk.

Comes now plaintiff by Harry N. Haynes, its attorney, and for its amended complaint against said defendant filed by leave of Court, avers:

The amount involved in this case and the relief sought by plaintiff exceeds the sum of \$3,000.00.

29 Plaintiff's claimed right of recovery in each of its causes of action below stated, really and substantially involves rights which depend upon the construction and effect of the Constitution and a statute of the United States, viz.:

(1) That sentence in Section 1 of Article XIV of Amendments to the Constitution of the United States which so far as applicable reads:

Nor shall any state deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

(2) A provision of Section 5219 of The Revised Statutes of the United States pertaining to taxation of property of national banks that the taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such state.

Plaintiff further avers:

For First Cause of Action.

I.

Plaintiff is and at all times herein mentioned has been a national banking association duly organized as such pursuant to the Acts of Congress in that behalf, with its place of business at Greeley in the County of Weld in the State and District of Colorado.

30

II.

By statute in Colorado the valuation of property for taxation is determined by its value on the first day of April of each calendar and fiscal year.

III.

On the first day of April, A. D. 1913, the full cash and market value of all the net assets of plaintiff bank correctly shown by its books and its report to the Comptroller of the Currency was a trifle less than and did not exceed \$239,000.00, which was then the sum of its capital stock, its surplus and its undivided profits.

IV.

On to-wit, the 11th day of June, A. D. 1913, plaintiff's cashier, conforming (save for deferred date) to Section 5756 of the Revised Statutes of Colorado of 1908, delivered to the assessor of said Weld County, plaintiff's verified statement showing the correct condition of plaintiff's assets as they existed on April 1 of that year, and that the full cash and market value thereof was and did not exceed \$239,000.00. Said statement accorded with one of like tenor showing the condition of plaintiff bank at close of business on April 4, 1913, which had been forwarded to the Comptroller of the Currency.

V.

31 The assessor of said Weld County thereupon in the summer of 1913, in preparation of assessment roll of said County for the said fiscal year, duly fixed the assessed value of all plaintiff's property for said year at \$239,000.00, which was its full cash and market value; he also fixed the assessed value of the property of each and every other bank in said County at its full cash and market value, but fixed the assessed value of the real estate and personal property of the remaining taxpayers of said County originally assessable by and through his office, at only about 61 per cent of the full cash and market value thereof.

VI.

The County Board of Equalization in Weld County, at its meeting in September, 1913, made no change in the assessed valuation of plaintiff's property or that of the other banks in said County for said calendar and fiscal year. While said Board made some changes regarding the assessed value of a few items of other property in said County, it did not materially raise said assessor's valuation thereof or bring the assessed value of the real and personal property in said county owned by taxpayers other than the banks to more than 61 or 62 per cent of the full cash or market value thereof.

VII.

Before the meeting of said County Board of Equalization in September, 1913, the assessor of said Weld County made and
32 transmitted to the Colorado Tax Commission an abstract of all the real and personal property in said County as then assessed by and through his office, and of the property of railroads and other public utilities in said county as assessed by the Colorado Tax Commission.

Said abstract with corrections made by said assessor before it was considered by said Colorado Tax Commission showed

Total assessment of property in said County made through assessor's office	\$37,214,710
Assessment of property initially assessed by said Colorado Tax Commission (such as railroads, etc.) ..	16,474,330
Total	\$53,689,040

On said abstract, the assessed valuation of the property of plaintiff and of the other banks in said county was fixed at the full cash and market value thereof; but the assessed valuation of the remaining property in said county so far as the same had been assessed by and through the office of said County Assessor did not exceed 61 per cent of its full, fair cash and market value.

VIII.

Thereafter, to-wit, in the month of October, 1913, said The Colorado Tax Commission assumed to determine that the assessed valuation of the aggregate of all property in said Weld County reported by said assessor in said abstract as corrected by him,
33 exclusive of property initially assessed by said The Colorado Tax Commission had been under-assessed by and through said assessor's office and reported that in the opinion of said Commission, a horizontal raise or increase of 63 per cent was necessary to bring the assessed valuation of the totality of said property up to full cash and market value thereof.

Thereupon said The Colorado Tax Commission transmitted to the State Board of Equalization its said determination, specifying and recommending that the sum of \$23,447,440, being a raise of 63 per cent, should be a horizontal raise added to the assessed valuation of all taxable property in said county, exclusive of railroad and like property which had been assessed initially by said The Colorado Tax Commission.

IX.

Thereafter on the 22nd day of October, 1913, the State Board of Equalization of the State of Colorado adopted said determination and recommendation of said The Colorado Tax Commission, and by resolution of said Board assumed to direct that the assessed valuation of all the real and personal property in said Weld County other than that initially assessed by said The Colorado Tax Commission should be raised to..... \$60,662,150
leaving unchanged the valuation of railroads, public utilities, etc., as initially assessed by said The Colorado Tax Commission, viz..... 16,474,330

Making a total of..... \$77,136,480

34

X.

On the 22nd day of October, 1913, said State Board of Equalization gave written notice of said resolution to the assessor of said Weld County and directed him to change the assessment roll thereof for the fiscal year 1913 by adding 63 per cent. to the assessed valuation of all property initially assessed through his office as shown by the corrected abstract referred to in paragraph VII hereof. Said The Colorado Tax Commission gave said assessor similar notice and direction on the same day.

XI.

Thereafter said assessor, following said directions, changed accordingly the assessment roll of said county so that as finally revised and delivered to the county treasurer of said county with the assessor's warrant for collection thereof on or about the 1st day of March, A. D. 1914, there was extended on the tax roll of said county as final assessment of all the assets of plaintiff \$388,760.00.

Said assessment so extended on the tax roll exceeded by \$149,760.00, or 63 per cent. the full book and cash value of all the shares of stock of plaintiff and exceeded by said sum the full cash and market value of all plaintiff's net assets existing on the 1st day of April, A. D. 1913.

The result of said horizontal raise as so extended caused
also the final extended assessed valuation of the property of
each and every other bank in said Weld County to be fixed
at 63 per cent. above the full cash and market value thereof.

35

XII.

The aggregate levies for the year 1913 made by the several taxing authorities applicable to the territory wherein plaintiff's said property was situated amounted to 16.8 mills.

By virtue of said assessment the tax imposed against plaintiff on said tax roll was made to appear as..... \$6,531.17

Said mill levy applied to the full actual value of plaintiff's assets made a total tax to which plaintiff was justly liable 4,015.20

The erroneous part of the tax so imposed was..... \$2,515.97

XIII.

Assessors in other counties in the State of Colorado during said fiscal year of 1913 followed the same rule relative to bank property in their initial assessment thereof as did the assessor of said Weld County, but said The Colorado Tax Commission did not recommend nor did the State Board of Equalization direct any increase or raise approximating 63 per cent. in any other county. In Larimer County and in many others, no horizontal increase whatever was imposed. In Boulder County, the directed horizontal increase was only 3.7 per cent. In sundry other countries, the direct horizontal increase varied from 3.7 per cent. to 40 per cent.

XIV.

Said action of said The Colorado Tax Commission and said The State Board of Equalization caused an extension on the tax rolls of the different counties in the State of Colorado of an unequal and varying assessed valuation of the property of banks and of bank shares and in said Weld County a grossly excessive and erroneous assessment of their property over that of like property elsewhere in Colorado. With said 63 per cent. horizontal raise or increase, the final assessment imposed and extended on the tax rolls of said Weld County for the fiscal year 1913 for other classes of property in said county and the initial assessment imposed upon railroads, public utilities and the like by The Colorado Tax Commission which was not raised, constituted a fair approximation to the full market value thereof, but upon plaintiff and the other banks of said county, it constituted an excess over full just value for taxation of 63 per cent. of full fair cash value.

XV.

The levy imposed for all purposes of the State of Colorado, including state institutions and the like, for the fiscal year 1913, was 1.3 mills. Said levy when applied to the erroneous increase of assessed valuation of plaintiff's taxable property in excess of its full cash

and market value is \$194.69. Inasmuch as there was no increase in assessed valuation of property of state and national banks and other monied capital in numerous other counties of the state which had been initially assessed upon the same basis as that of plaintiff, the imposition of said excessive tax if not refunded, will deprive plaintiff and its share holders of rights protected by Section 5219 of The Revised Statutes of the United States and particularly the provision thereof referring to taxation of national banks which so far as applicable reads:

that the taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such state.

XVI.

On to-wit, the 29th day of April, A. D. 1914, pursuant to Section 5 of

"An act in relation to revenue, creating new sections, Amending Sections 5540, 5572, 5634 and 5666 and repealing Sections 5638 and 5765 of The Revised Statutes of Colorado, 1908, and also repealing all acts or parts of acts in conflict therewith," approved May 1, 1913,

plaintiff filed, in triplicate, with defendant, its petition for abatement and rebate of said \$2,515.97 of erroneous and excessive taxes imposed, stating in substance as grounds therefor the matters hereinbefore set forth.

Before hearing of said petition for abatement and rebate, notice thereof and opportunity to be present was given to the assessor of said Weld County as required by said Section 5 of said statute. Said petition, in triplicate, was delivered to said assessor and by him returned to defendant with his recommendation in favor of granting its prayer.

Thereafter on the 12th day of May, A. D. 1914, defendant at a duly adjourned meeting thereof, certified said petition, after a hearing had been had thereon, with its approval thereof to The Colorado Tax Commission for its approval or disapproval. Thereafter said Commission returned said petition to said county board with its endorsement thereon of its disapproval thereof, stating no reasons or grounds for its action in that behalf.

At the same time, the remaining banks in said County severally filed like petitions for abatement and rebate of the 63 per cent. of excessive and unjust taxation in like manner imposed upon them, which petitions resulted in like favorable recommendations by the Board of County Commissioners of said Weld County and like disapproval of said Colorado Tax Commission.

By virtue of the premises said The Colorado Tax Commission made a systematic, intentional and arbitrary discrimination against plaintiff and the other banks of said Weld County by refusing to afford them relief against excessive, illegal and unjust burden of taxation.

XVII.

Said petition for an abatement and rebate of said \$2,515.97 of said erroneous and excessive tax was the first opportunity afforded plaintiff under the statutes of the State of Colorado to seek redress in said matter. The only remaining opportunity to obtain redress is for the defendant herein, The Board of County Commissioners of the County of Weld, to order a refund when it shall be judicially found that payment under protest by plaintiff of said portion of said tax with interest and costs imposed thereon was erroneous and illegal pursuant to Section 5750 of The Revised Statutes of Colorado of 1908, as construed by the Supreme Court of the State of Colorado in the case of First National Bank of Greeley v. Patterson, County Treasurer, reported in 65 Colorado at pages 166-176. Said Section 5750 so far as applicable reads:

Where any person shall pay any tax, interest or cost, or any portion thereof, that shall thereafter be found to be erroneous or illegal, the board of county commissioners shall refund the same without abatement or discount to the taxpayer.

40

XVIII.

Thereafter, during the year 1914, plaintiff paid to the treasurer of said Weld County the sum of \$4,015.20, being the full amount of the total mill levies assessed against the actual full and fair valuation of its taxable property in said county as initially correctly assessed by the assessor of said county; and thereafter on the 8th day of March, A. D. 1915, paid to said county treasurer under protest the sum of \$2,717.24, being the said excessive tax so wrongfully imposed with claimed interest and penalties based on failure to make said payment earlier.

XIX.

On the 18th day of February, A. D. 1921, plaintiff presented to and filed with defendant in the office of its secretary, its claim and demand for audit and allowance of said taxes, interest and penalties so paid under protest, and presented to defendant its demand for refund to it of said sum of \$2,717.24 because of said payment under protest of said erroneous and excessive imposed taxes for the fiscal year 1913 with interest and penalties in accordance with Section 5750 of The Revised Statutes of Colorado of 1908, and filed its application for said refund with defendant on said day, in triplicate, and delivered to the assessor of said Weld County a notice of said filing and in all respects conformed to the requirements of Section 5, page 528, Colorado Session Laws of 1913, in that behalf.

41

XX.

Defendant has not paid or refunded to plaintiff or ordered payment or refund to plaintiff of said \$2,717.24 or any part thereof.

XXI.

Said action of said administrative boards and of said officials and their failure to act as aforesaid, if not later corrected by judgment of court that plaintiff have and recover the erroneous and excessive portion of said tax imposed upon it as herein prayed, is contrary to that provision of Section 3, Article X of the Constitution of the State of Colorado which provides

All taxes * * * shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property.

By reason thereof, if said erroneous and excessive tax be not refunded by judgment of the court as prayed herein, the State of Colorado by its officials acting under color of its legislation, will deny to plaintiff in said matter the equal protection of the laws and will deprive plaintiff of property without due process of law, contrary to the provision of Section 1, Article XIV of Amendments to the Constitution of the United States.

For Second Cause of Action.

42

I.

Plaintiff adopts and by reference makes a part of this cause of action the averments in paragraphs I and II of the first cause of action herein.

II.

On the first day of April, A. D. 1914, the full cash and market value of all the net assets of plaintiff bank correctly shown by its books and its report to the Comptroller of the Currency was \$231,744.00, which was then the sum of its capital stock, its surplus and its undivided profits.

III.

In due time in the spring of the year 1914, plaintiff's cashier, conforming to Section 5756 of the Revised Statutes of Colorado of 1908, delivered to the assessor of said Weld County plaintiff's verified statement showing the correct condition of plaintiff's assets as they existed on April 1 of that year, and that the full cash and market value thereof was and did not exceed \$231,744.00.

IV.

The assessor of said Weld County thereupon in the summer of 1914 in preparation of assessment roll of said county for said fiscal year duly fixed the assessed value of all plaintiff's property for said year at \$231,744.00, which was its full cash and market value; he also fixed the assessed value of the property of each and every other

43 bank in said county for said year at is full cash and market value, but fixed the assessed value of the real estate and personal property of the remaining taxpayers of said county for said year, originally assessable by and through his office, at only 80 per cent of the full cash and market value thereof. No change in said assessment was made by the County Board of Equalization of said county.

V.

Said assessor in the month of September, 1914, made and transmitted to the Colorado Tax Commission an abstract of the real and personal property in said Weld County with the assessed valuation thereof as so determined by and through his office, being the initial assessment made by him on real property and the assessed value of personal property listed by the several taxpayers with additions made by and through his office, and also inserted in said abstract the valuation of railroads and other public utilities initially assessed by the Colorado Tax Commission.

On said abstract, the assessed valuation of the property of plaintiff and of the other banks in said county was fixed at the full cash and market value thereof; but the assessed valuation of the remaining property in said county so far as the same had been assessed by and through the office of said County Assessor did not exceed 80 per cent of its full, fair cash and market value.

44

VI.

Thereafter, to-wit, in the month of October, 1914, said the Colorado Tax Commission assumed to determine that the total assessed valuation of all the property in said Weld County as shown by said abstract of property reported by said assessor as corrected was less than the full and true value of the totality of property so assessed, and that a horizontal raise or increase of 25 per cent. in the opinion of said Colorado Tax Commission, was necessary to reach its true cash value. Thereupon said The Colorado Tax Commission transmitted to The State Board of Equalization its said determination.

VII.

Thereafter, to-wit, in the month of October, 1914, the State Board of Equalization of the State of Colorado adopted said determination and recommendation of said Colorado Tax Commission, and by resolution of said board assumed to direct that the assessed valuation of all the real and personal property in said Weld County other than that initially assessed by the Colorado Tax Commission should be raised 25 per cent.

VIII.

In so recommending and ordering said horizontal raise, from the very nature of said action no opportunity to be heard was then afforded to plaintiff or to the other banks in said Weld County, the

45 property of which was thereby assumed to be ordered to be assessed at a sum 25 per cent. in excess of its full cash and market value.

IX.

Thereupon said state board promptly gave written notice of said resolution to the assessor of said Weld County and directed him to change the assessment roll thereof for the fiscal year 1914 by making a 25 per cent. increase in the valuation of all property assessed through his office as revised by the County Board of Equalization and as shown by the corrected abstract referred to in paragraph V hereof. Said Colorado Tax Commission gave said assessor similar notice and direction at the same time.

X.

Thereafter said assessor, following said directions, changed accordingly the assessment roll of said county so that as finally revised and delivered to the county treasurer of said county with the assessor's warrant for collection thereof prior to the 1st day of March, A. D. 1915, there was extended on the tax roll of said county as final assessment of all the assets of plaintiff \$289,680.00 for the fiscal year 1914. Said assessment exceeded by \$57,936.00 the full book and cash value of all the shares of stock of plaintiff and exceeded by said sum the full cash and market value of all plaintiff's net assets existing on the 1st day of April, A. D. 1914.

46 The result of said horizontal raise as so extended caused the final extended valuation of the property of each and every other bank in said Weld County to be fixed at 25 per cent above the full cash and market value thereof.

XI.

The aggregate levies made by the several taxing authorities applicable to the territory wherein plaintiff's said property was situated amounted to 19.1 mills.

By virtue of said assessment the tax imposed against plaintiff on said tax roll was made to appear as..... \$5,532.88

Said mill levy applied to the full actual value of plaintiff's assets made a total tax to which plaintiff was justly liable 4,426.30

The erroneous part of the tax so imposed was..... \$1,106.58

XII.

Assessors in other counties in the State of Colorado during said fiscal year of 1914 followed the same rule relative to bank property in their initial assessment thereof as did the assessor of said Weld County, but said Colorado Tax Commission did not recommend not

did the State Board of Equalization direct any increase or raise approximating 25 per cent in any other county. In Larimer County and in many others no horizontal increase whatever was imposed.

XIII.

Said action of said Colorado Tax Commission and said State Board of Equalization caused an extension on the tax rolls of the different counties in the State of Colorado of an unequal and varying assessed valuation of the property of banks and of bank shares and in said Weld County a grossly excessive and erroneous assessment of their property over that of like property elsewhere in Colorado. With said 25 per cent horizontal raise or increase, the final assessment imposed and extended on the tax rolls of said Weld County for the fiscal year 1914 for other classes of property in said county and the initial assessment imposed upon railroads, public utilities and the like by the Colorado Tax Commission which was not raised, constituted a fair approximation to the full market value thereof, but upon plaintiff and the other banks of said county, it constituted an excess over full just value for taxation of 25 per cent of full fair cash value.

XIV.

The levy imposed for all purposes of the State of Colorado, including state institutions and the like for the fiscal year 1914, was 1.39 mills. Said levy when applied to the erroneous increase of assessed valuation of plaintiff's taxable property in excess of its full cash value and market value is \$80.53. Inasmuch as there was no increase in assessed valuation of property of banks and other monied capital in numerous other counties of the state which had been initially assessed upon the same basis as that of plaintiff, the imposition of said excessive tax, if not refunded, will deprive plaintiff and its shareholders of rights protected by Section 5219 of the Revised Statutes of the United States and particularly the provision thereof referring to taxation of national banks which so far as applicable reads:

That the taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such state.

XV.

Thereafter in due time during the year 1915, plaintiff paid to the treasurer of said Weld County the sum of \$4,426.30, being the full amount of the total mill levies assessed against the actual full and fair valuation of its taxable property in said county as initially correctly assessed by the assessor of said county, and during said year paid to said county treasurer under protest the sum of \$1,106.58 (\$553.29 thereof on March 9th, and \$553.29 thereof on July 31st of said year, being the said excessive and erroneous tax so wrongfully imposed.

XVI.

On the 18th day of February, A. D. 1921, plaintiff presented to and filed with defendant in the office of its secretary its claim and demand for audit and allowance of said erroneous taxes, so paid under protest, and presented to defendant its demand for refund to it of said sum of \$1,106.58 because of said payment under protest of said erroneous and excessive imposed taxes for the fiscal year 1914, in accordance with Section 5750 of the Revised Statutes of Colorado of 1908, and filed its application for said refund with defendant on said day, in triplicate, and delivered to the assessor of said Weld County a notice of said filing and in all respects conformed to the requirements of Section 5, page 528, Colorado Session Laws of 1913 in that behalf.

XVII.

Defendant has not paid or refunded to plaintiff or ordered payment or refund to plaintiff of said \$1,106.58 or any part thereof.

XVIII.

Said action of said administrative boards and of said officials and their failure to act as aforesaid, if not later corrected by judgment of court that plaintiff have and recover the erroneous and excessive portion of said tax imposed upon it as herein prayed, is contrary to that provision of Section 3, Article X of the Constitution of the State of Colorado which provides

All taxes * * * shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property.

50 By reason thereof, if said erroneous and excessive tax be not refunded by judgment of the court as prayed herein, the State of Colorado by its officials acting under color of its legislation, will deny to plaintiff in said matter the equal protection of the laws and will deprive plaintiff of property without due process of law, contrary to the provision of Section 1, Article XIV of Amendments to the Constitution of the United States.

Wherefore, plaintiff prays for judgment of this honorable court that it have and recover of and from defendant the sum of \$3,823.82, viz.: \$2,717.24 as refund of the erroneous, illegal and unconstitutional imposition of taxes for the fiscal year 1913 as stated in its first cause of action, and \$1,106.58 as refund of the erroneous, illegal and unconstitutional imposition of taxes for the fiscal year 1914 as stated in its second cause of action and for costs of suit.

HARRY N. HAYNES,
Attorney for Plaintiff.

STATE OF COLORADO,
City and County of Denver, ss:

Harry N. Haynes, of lawful age, being first duly sworn on oath says: I am a practicing attorney and counsellor at law and am attorney of the plaintiff, The First National Bank of Greeley, a national banking association, in this case. I have read the above
51 and foregoing amended complaint and well know the contents thereof. All and singular the matters and facts therein averred and set forth are true to my best knowledge and belief. I verily believe each and all of them to be true.

HARRY N. HAYNES.

Subscribed and sworn to before me this 8th day of November, A. D. 1921.

My notarial commission expires January 24, 1922.

[Notarial Seal.]

CHARLES W. LUFF,
Notary Public.

7141.

In the District Court of the United States for the District of Colorado.

Law Docket, Case No. 7141.

THE FIRST NATIONAL BANK OF GREELEY, a National Banking Association, Acting for Itself and as Trustee for All Its Shareholders,
Plaintiff,

vs.

52 THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF
WELD, Defendant.

Demurrer to Amended Complaint.

Filed Nov. 23, 1921. Charles W. Bishop, Clerk.

Comes now the defendant by its attorneys and demurs to the amended complaint heretofore filed herein and as grounds thereof sets forth:

I.

To the first cause of action, on the ground that said amended complaint does not in said cause of action allege facts sufficient to constitute a cause of action against the defendant.

II.

To the second cause of action, on the ground that said amended complaint does not in said cause of action allege facts sufficient to constitute a cause of action against the defendant.

III.

To both causes of action, on the ground that said amended complaint does not allege facts sufficient to constitute a cause of action against the defendant.

IV.

To both causes of action, on the ground that said amended complaint, as to each cause of action, is the same in substance, purport and legal effect as the original complaint filed herein, and the corresponding causes of action therein set forth, and to which this
53 Court has already sustained a general demurrer as to both causes of action for want of sufficient facts to constitute a cause of action, all as shown by the records and files herein.

WM. KELLEY,
Attorney for Defendant.

VICTOR E. KEYES,
Attorney General;
CHARLES ROACH,
Deputy Attorney General,
Of Counsel.

Seventy-fifth Day, May Term, Friday, September 29th, A. D. 1922.

Present: The Honorable T. Blake Kennedy, judge of the district court of the United States for the district of Wyoming, assigned to hold the district court of the United States for the district of Colorado, the Honorable J. Foster Symes, district judge, and other officers as noted on the sixth day of July, A. D. 1922.

And before the Honorable J. Foster Symes, district judge, the following proceeding was had:

7141.

THE FIRST NATIONAL BANK OF GREELEY, a National Banking Association, Acting for Itself and as Trustee for All Its Shareholders,

VS.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD.

Money Demand.

54 At this day comes the plaintiff by Harry N. Haynes, Esquire, its attorney, and the defendant by William R. Kelly, Esquire, its attorney, also comes. And the demurrer to the amended complaint coming on now to be heard is argued by counsel, and the court having considered the same and being now fully advised in the premises, it seemeth to the court now here that the amended complaint herein is not sufficient in law to be answered unto and so the said demurrer is hereby sustained.

Second Day, November Term, Wednesday, November 8th, A. D. 1922.

Present: The Honorable Robert E. Lewis, Circuit Judge, assigned to hold the District Court of the United States for the District of Colorado, the Honorable J. Foster Symes, District Judge, and other officers as noted on the seventh day of November, A. D. 1922.

And before the Honorable J. Foster Symes, District Judge, the following proceeding was had:

7141.

THE FIRST NATIONAL BANK OF GREELEY, a National Banking Association, Acting for Itself and as Trustee for All Its Shareholders,

VS.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD.

Money Demand.

At this day comes the plaintiff by Harry N. Haynes, Esquire, its attorney and the defendant by William R. Kelly, Esquire, its attorney also comes.

55 And the motion of the defendant for judgment on the pleadings herein coming on now to be heard is argued by counsel. And thereupon the plaintiff saith that it will and doth hereby elect to stand upon its amended complaint herein and declines to plead further.

Wherefore it is considered by the court that the plaintiff take nothing by reason of its complaint herein and that the defendant go hence hereof without day and have and recover of and from the plaintiff its costs by it in this behalf laid out and expended to be taxed and have execution therefor. And bond on writ of error or appeal to the Supreme Court of the United States shall be in the sum of Five hundred dollars (\$500.00).

7141.

In the District Court of the United States for the District of Colorado.

No. 7141, Law Docket.

THE FIRST NATIONAL BANK OF GREELEY, a National Banking Association, Acting for Itself and as Trustee for All Its Shareholders, Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD,
Defendant.

56 *Petition for Writ of Error from the Supreme Court of the United States to said District Court.*

Filed Nov. 15, 1922. Charles W. Bishop, Clerk.

Now comes The First National Bank of Greeley, plaintiff, by Harry N. Haynes, Esq., its attorney, and respectfully represents that on the 8th day of November, A. D. 1922, a judgment was entered by this Court dismissing its amended complaint in said cause, and for costs.

And plaintiff, your petitioner, respectfully shows and claims that in the record of said cause and in its judgment, manifest errors have been committed, to the evident prejudice of your petitioner, all of which will appear more in detail in the assignment of errors which is filed with this petition.

Wherefore, plaintiff, your petitioner, prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises; further that the Court fix the amount of the bond to be filed by said plaintiff and petitioner and that the same shall operate as a supersedeas bond.

HARRY N. HAYNES.

Attorney for Plaintiff and Plaintiff in Error.

57

7141.

In the District Court of the United States for the District of Colorado.

No. 7141, Law Docket.

THE FIRST NATIONAL BANK OF GREELEY, a National Banking Association, Acting for Itself and as Trustee for All Its Shareholders, Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, Defendant.

Assignment of Errors.

Filed Nov. 15, 1922. Charles W. Bishop, Clerk.

Now comes said plaintiff as plaintiff in error, by Harry N. Haynes, Esq., its attorney, and in connection with its petition for a writ of error from the Supreme Court of the United States to said District Court says that in the record, proceedings and in the final judgment in said cause in said District Court manifest error has intervened to the prejudice of plaintiff in error as follows, and assigns for error:

58 First. The Court erred in sustaining general demurrer to the first cause of action in its original complaint.

Second. The Court erred in sustaining general demurrer to the second cause of action in its original complaint.

Third. The Court erred in sustaining general demurrer to the first cause of action in its amended complaint.

Fourth. The Court erred in sustaining general demurrer to the second cause of action in its amended complaint.

Fifth. The Court erred in sustaining general demurrer to both causes of action in its original complaint.

Sixth. The Court erred in sustaining general demurrer to both causes of action in its amended complaint.

Seventh. The Court erred in entering and rendering judgment against the plaintiff when it elected to stand on its amended complaint, and on each cause of action stated therein.

Eighth. The Court erred in holding that the imposition of the taxes against plaintiff for the year 1913, paid under protest by plaintiff, as stated in the first cause of action in its original and in its amended complaint, was held by the highest court of the State of Colorado to be valid.

Ninth. The Court erred in holding that the imposition of the taxes against plaintiff for the year 1914, paid under protest by plaintiff as stated in the second cause of action in its original and in its amended complaint, was held by the highest court of the
59 State of Colorado to be valid.

Tenth. The Court erred in holding that the Supreme Court of Colorado has held that upon plaintiff paying, under protest, that part of the taxes imposed against it for the year 1913 on an assessment of 63 per cent. over the full cash and market value of all its property, an action at law would not lie under Section 5750, Revised Statutes of Colorado of 1908, to recover the same.

Eleventh. The Court erred in holding, on the assumption that the highest court of Colorado has held that an action at law will not lie to recover grossly unjust and excess taxes when paid under protest, that said decision of said state court did not so construe the law of Colorado as to cause the State of Colorado to deprive plaintiff of property without due process of law and to deny plaintiff the equal protection of the laws secured to it by Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Twelfth. The Court erred, by its said rulings, orders and judgment, in holding that the State of Colorado, through its taxing officials and a decision of its highest court, had not deprived plaintiff of property without due process of law and had not denied plaintiff the equal protection of the laws secured to it by Section 1 of the Fourteenth Amendment of the Constitution of the United States, on the assumption made by the trial court herein that said highest
60 court of said state had decided after the horizontal raise complained of that a class of taxpayers in a county who had been assessed originally at the correct standard at their own instance, were without remedy against a subsequent horizontal raise which brought other property in the county up to said correct standard; because plaintiff (a member of said class) did not petition the County Board of Equalization to raise the assessed value of other property in said county to the same standard and because later it did not appear before the Colorado Tax Commission to request that body, should it make a horizontal raise, to exclude therefrom the property of said class.

Thirteenth. The Court erred in holding, in effect, that there was any provision of the Colorado statutes other than said Section 5750 wherein and whereby plaintiff was afforded due process of law to obtain redress for the assessment, levy and consequent imposition of taxes for the year 1913 on a ratio 63 per cent, and for the year 1914, 25 per cent higher than a just tax.

Fourteenth. The Court erred in holding in effect, by its rulings on said demurrers and by its judgment, that in assessing for taxation the property of plaintiff upon a ratio 63 per cent higher, as compared with its full cash and market value, than was assessed against banks

and other moneyed capital in numerous other counties in the state upon which the same general state levies were imposed, that plaintiff is not entitled to judicial relief pursuant to the terms of Section 5129 of The Revised Statutes of the United States.

61 Fifteenth. The Court erred, by its said rulings, orders and judgment, in denying to plaintiff the protection of the rule stated in Section 3, Article 10 of the Constitution of the State of Colorado, viz.:

"All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax,"

for that, on the facts stated in the complaint and in the amended complaint, the tax imposed upon plaintiff was the result of applying the same mill levy for general state purposes to a 63% higher valuation than elsewhere in said state; whereby the State of Colorado denied to plaintiff the equal protection of the laws, contrary to the terms of Section 1 of Article 14 of the Amendments to the Constitution of the United States.

Sixteenth. The Court erred, by its said rulings, orders and judgment, in refusing to give to plaintiff the benefit of the rules to define just valuation of taxable property prescribed by Sections 5591 and 5756 of The Revised Statutes of Colorado of 1908, because it appears from the facts stated in the complaint that the refusal of the Colorado Tax Commission to endorse its approval of the abatement and rebate of the portion of the tax complained of for the year 1913, recommended by the Board of County Commissioners of Weld County, and in noting its disapproval thereof, was not based on any consideration or evidence of the full, true cash value of the

62 property of plaintiff, as prescribed by said sections, or otherwise, but was an arbitrary act contrary to the letter, spirit and intent of Section 5 of An Act in Relation to Revenue, etc., approved May 1, 1913; and further, because as the result of said disapproval, a system of valuation was adopted by the assessing authorities which was designed to and of necessity did operate to the damage and injury of plaintiff and to all other banks of said county as a class as compared with all other taxpayers of said county, whereby, without affording redress under Section 5750 of The Revised Statutes of Colorado of 1908, the State of Colorado denied to plaintiff the equal protection of the laws, and deprived plaintiff of property without due process of law, contrary to the provisions of Section 1, Article 14 of the Amendments to the Constitution of the United States.

Seventeenth. The Court erred, by its said rulings, orders and judgment, in depriving plaintiff of the right under Section 3, Article 10 of the Constitution of the State of Colorado, to have taxes imposed upon it under general laws which shall prescribe such regulations as shall secure a just valuation of all property, real and personal; because on the facts stated in the complaint and in the amended complaint, the portion of the alleged tax complained of in the first

cause of action was the result of applying the aggregate mill levies for all purposes on an unjust valuation, viz.: 163 per cent of the full cash and market value on April 1, 1913, of all plaintiff's property and of that of all banks in said county as a class, while the tax imposed on all other taxable property in said county was the result of applying the same mill levies on not to exceed 100 per cent of its full cash and market value on the same date; whereby an unjust, arbitrary and grossly excessive tax was imposed on the property of banks in said county as a class and upon the property of plaintiff in particular; and whereby, without granting redress to plaintiff after paying under protest the excessive part of said tax, pursuant to Section 5750 of The Revised Statutes of Colorado of 1908, the State of Colorado, by its officials, has denied to plaintiff due process of law and the equal protection of the laws, contrary to the provisions of Section 1, Article 14 of the Amendments to the Constitution of the United States.

By reason whereof, plaintiff in error prays that the judgment aforesaid may be reversed, and the cause remanded to said District Court with instructions to overrule the demurrer to the first cause of action in the amended complaint, to overrule the demurrer to the second cause of action in the amended complaint, to overrule the demurrer to the amended complaint as a whole, and to rule the defendant to answer.

HARRY N. ~~HAYES~~ ^{Hayes},
*Attorney for the First National Bank
of Greeley, Plaintiff in Error.*

64

7141.

Bond on Writ of Error.

Filed Nov. 21, 1922. Charles W. Bishop, Clerk.

7141.

Know all men by these presents, That we, The First National Bank of Greeley, a National Banking Association, acting for itself and as Trustee for all its Shareholders, as principal, and John M. B. Petrikin and John S. Davis, as sureties, are held and firmly bound unto The Board of County Commissioners of the County of Weld in the full and just sum of Five Hundred Dollars, to be paid to the said The Board of County Commissioners of the County of Weld: to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 17th day of November, in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, lately at a term of the District Court of the United States for the District of Colorado in a suit pending in said Court, between The First National Bank of Greeley, a National Banking

Association, acting for itself and as Trustees for all its Shareholders, as Plaintiff, and The Board of County Commissioners of the County of Weld, as Defendant, a judgment was rendered against the said The First National Bank of Greeley for defendant dismissing said cause and for costs, and the said The First
 65 National Bank of Greeley having obtained a writ of error from the Supreme Court of the United States to the said District Court of the United States for the District of Colorado to reverse the judgment in the aforesaid suit.

Now, the condition of the above obligation is such, that if the said The First National Bank of Greeley shall prosecute its writ of error to effect, and shall pay the amount of said judgment, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of First National Bank of Greeley, Colo.]

THE FIRST NATIONAL BANK OF GREELEY,
 By J. M. B. PETRIKIN,

President.

JOHN M. B. PETRIKIN.
 JOHN S. DAVIS.

[SEAL.]

[SEAL.]

Attest:

J. S. DAVIS,
Cashier.

Sealed and delivered in presence of:

T. V. GRANTHAM.
 J. O. CUSTER.
 C. E. MASON.

Approved by:

J. FOSTER SYMES,
Judge.

66 Twentieth Day, November Term, Friday, December 1st,
 A. D. 1922.

Present: The Honorable Robert E. Lewis, Circuit Judge, assigned to hold the district court of the United States for the District of Colorado, and the Honorable J. Foster Symes, District Judge, and other officers as noted on the seventh day of November A. D. 1922.

And before the Honorable J. Foster Symes, District Judge, the following proceeding was had:

7141.

THE FIRST NATIONAL BANK OF GREELEY, a National Banking Association, Acting for Itself and as Trustee for All Its Shareholders,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD.

Money Demand.

At this day for good cause shown, it is ordered that the return day of citation on writ of error to The Supreme Court of The United States, be and the same is hereby enlarged and extended for thirty (30) days.

67 Filed Nov. 21, 1922. Charles W. Bishop, Clerk.

7141.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the District of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you at the November Term, A. D. 1922, thereof, between The First National Bank of Greeley, Colorado and The Board of County Commissioners of The County of Weld, a manifest error hath happened, to the great damage of the said The First National Bank of Greeley, Colorado, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to The Supreme Court of The United States, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, in the District of Columbia, and filed in the office of the clerk of The Supreme Court of The United States,

on or before the twentieth day of December, A. D. 1922, to the end that the record and proceedings aforesaid being inspected, The Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, The Honorable William H. Taft, Chief Justice of the United States, this twentieth day of November, in the year of our

Lord, one thousand nine hundred and twenty-two, and of the Independence of the United States, the one hundred and forty-seventh year. Issued, at office in the city and county of Denver, in said district, with the seal of the district court of the United States for the district of Colorado, and dated as aforesaid.

[Seal of United States District Court, District of Colorado.]

CHARLES W. BISHOP,

Clerk United States District Court, District of Colorado.

Allowed by

J. FOSTER SYMES,

Judge.

69

Return.

THE UNITED STATES OF AMERICA,

District of Colorado, ss.:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the district court of the United States for the district of Colorado, at the city and county of Denver, in said district, this 14th day of December A. D. 1922.

[Seal of United States District Court, District of Colorado.]

CHARLES W. BISHOP,

Clerk,

By ———,

Deputy Clerk.

70

Filed Nov. 25, 1922. Charles W. Bishop, Clerk.

7141.

UNITED STATES OF AMERICA, ss.:

In the Supreme Court of the United States.

The United States of America to the Board of County Commissioners of the County of Weld, Greeting:

You are hereby cited and admonished to be and appear in The Supreme Court of the United States, thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of Colorado, sitting at Denver, wherein The First National Bank of

Greeley, Colorado, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable J. Foster Symes, Judge of the district court of the United States for the district of Colorado, at Denver, in said district, this twentieth day of November, A. D. 1922.

J. FOSTER SYMES,
Judge.

71 *Proof of Service.*

UNITED STATES OF AMERICA,
District of Colorado, ss:

On this — day of —, A. D. 1922, personally appeared — before me, the subscriber, clerk of the District Court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to — —.

Sworn to and subscribed before me, this — day of —, A. D. 1922.

— —, Clerk,
By — —, Deputy Clerk.

I hereby acknowledge service of the within citation.

Dated at Greeley, Colorado, this 24th day of November, A. D. 1922.

WILLIAM R. KELLY,
*Attorney for Defendant in this Cause
in the District Court of the United
States for the District of Colorado.*

72 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the district court of the United States for the District of Colorado do hereby certify the above and foregoing pages numbered from one (1) to seventy-one (71) both inclusive, to be a true, perfect and complete transcript and copy of the record and proceedings and of all things in a certain cause lately in said court pending wherein The First National Bank of Greeley was plaintiff and The Board of County Commissioners of the County of Weld was defendant as fully as the same still remains of record in my office in Denver.

In Testimony to the above and foregoing I do hereto sign my name and affix the seal of said court at Denver in said District this 14th day of December, A. D. 1922.

[Seal of United States District Court, District of Colorado.]

CHARLES W. BISHOP,
Clerk.

Filed Oct. 7, 1921. Charles W. Bishop, Clerk.

No. 7141.

In the District Court of the United States for the District of Colorado.

73

Law Docket, Case No. 7174.

THE FIRST NATIONAL BANK OF GREELEY, a National Banking Association, Acting for Itself and as Trustee for All Its Shareholders, Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, Defendant.

Memorandum.

CARLAND, *Acting District Judge:*

The complaint contains two causes of action. In the first cause of action plaintiff seeks to recover the sum of \$2,717.24 for taxes paid for the year 1913, which are alleged to have been illegal. In the second cause of action plaintiff seeks to recover \$1,106.58 for taxes paid for the year 1914 which are alleged to have been illegal. The defendant has filed a general demurrer to each cause of action. Assuming that the action is properly brought, I think the case is ruled by the case of First National Bank v. Patterson, County Treasurer, 65 Colo., 166, decided May 17, 1917. Rehearing denied

74 Dec. 2, 1918. That was an action by this same plaintiff to have declared illegal and void the taxes mentioned in the first cause of action. The statement of the case as it appears on page- 166-172 of the opinion of the Supreme Court of Colorado shows the same facts. The plaintiff in error urged the following points: (a) Denial of equal protection of the laws under Sec. 1, Art. 14 Amendments to U. S. Constitution. (b) Taxes not uniform with those upon other moneyed capital. Sec. 5219 R. S. U. S. (c) That plaintiff had taken all steps to secure relief through assessing officers. (d) That the action was properly brought at law under Sec. 21 Colo. Code. The action in the State court where the Code procedure prevails was claimed to be properly brought either as an action at law or in equity. A demurrer had been interposed and sustained in the trial court of the State. The Supreme Court affirmed the judgment of the lower court on the ground that the bill

did not state sufficient facts to warrant the relief prayed for either at law or in equity. After having disposed of the case on the merits the court went on to say that under Sec. 5750 Rev. Stats. 1908 of Colo. a law action would lie to recover taxes not legally paid, the point upon which the Supreme Court in the case of Union Pacific Railroad Co. v. Weld County, 247 U. S. 282, had expressed some doubt. The taxes which were in issue in the case in the State court were levied in and pursuant to the laws of the State of Colorado, and the highest court of that State has decided that these taxes were valid. The same reasoning by which the taxes for the year 1913 were sustained applies to the year 1914. Of course the
 75 opinion of the Supreme Court of Colorado upon a question arising under the Constitution of the United States would not be binding upon this court but as the taxes according to the opinion of the Supreme Court of Colorado were lawfully levied under the laws of Colorado, the case must be a clear one which would authorize this court to disagree with the State court. It may also be stated that no briefs have been filed in this court in support of the Complaint except the several briefs filed by the plaintiff in error in the case of Bank v. Patterson, supra. This shows that in the opinion of counsel the case here is the same as the case in the Supreme Court of Colorado. The demurrer is sustained.

7141.

Memorandum.

Filed Sep. 29, 1922. Charles W. Bishop, Clerk.

In the District Court of the United States for the District of Colorado.

No. 7141.

THE FIRST NATIONAL BANK OF GREELEY, a National Banking Association, Acting for Itself and as Trustee for All Its Shareholders, Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, Defendant.

76 It appears from the record that the substantial issues in this case have been passed upon by the Supreme Court of the State of Colorado, (First National Bank v. Patterson, 65 Colo. 166), and also by Judge Carland of this Court. The amended complaint is the same as the original complaint already passed upon as above, except only the addition of some allegations that are merely conclusions of law. The demurrer to the amended complaint will be sustained.

J. FOSTER SYMES,
District Judge.

September 29, 1922.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the District Court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from seventy-two (72) to seventy-six (76) both inclusive to be a true, perfect and complete transcript and copy of all opinions of the court filed in said court in said cause.

In testimony to the above and foregoing I do hereto sign my name and affix the seal of said court at Denver in said District this 14th day of December, A. D. 1922.

[Seal of United States District Court, District of Colorado.]

CHARLES W. BISHOP,
Clerk.

Endorsement on cover: File No. 29,317. Colorado D. C., U. S. Term No. 767. The First National Bank of Greeley, plaintiff in error, vs. The Board of County Commissioners of the County of Weld. Filed December 27th, 1922. File No. 29,317.

Supreme Court of the State of New York

**RETURNED TO THE
CLERK OF THE COURT**

**THE FIRST NATIONAL BANK OF GREENEY,
PLAZA IN GREENEY,**

**THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF WELD,**

**IN ORDER TO THE CREDIT OF THE
UNITED STATES AND THE DEPARTMENT
OF AGRICULTURE**

RALPH L.

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(29,317)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

No. 767

THE FIRST NATIONAL BANK OF GREELEY,
Plaintiff in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF WELD,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT
OF COLORADO.

BRIEF OF PLAINTIFF IN ERROR.

I.

INTRODUCTORY.

The District court sustained a general demurrer to the original and then to amended complaint in an action at law after payment under protest to recover excessive taxes and penalties imposed for the years 1913 and 1914,

whereby it is charged the State of Colorado, through its fiscal officials, deprived plaintiff in error (hereafter termed "plaintiff") of property without due process of law and denied to it the equal protection of the laws, contrary to the 14th amendment of the Federal Constitution; and also subjected plaintiff, a national bank, and its shareholders, to a greater rate of taxation than was assessed upon other monied capital in said state, contrary to the provisions of Section 5219, U. S. Rev. Stats. Plaintiff electing to stand on its amended complaint, judgment of dismissal was entered.

The amended complaint was filed by leave of court to state the facts more succinctly and in better sequence. Discussion of the court's rulings on the first cause of action in amended complaint suffices to cover also what grows out of the second cause of action therein as well as the rulings incident to the original pleading because involving the same questions of law.

II.

STATEMENT OF THE CASE.

Synopsis of Amended Complaint.

For full text, see printed Transcript of Record, pages 16-23.

Following averments that the case substantially concerns rights depending upon the effect of said provisions of the National Constitution and statute, it proceeds:

For First Cause of Action:

1. Plaintiff is a national bank doing business at Greeley, Weld county, Colorado.

2. By Colorado statute, taxes are levied on full cash market value of property on April 1 of each year.

3. On April 1, 1913, said value of all plaintiff's assets was \$239,000, being the sum of its capital stock, its surplus and undivided profits.

4. On June 11, 1913, plaintiff delivered to the assessor of said county verified statement showing said correct condition and value.

5. In the summer of 1913, said assessor correctly assessed the property of plaintiff and of each other bank in said county as so reported; but assessed the property of the other taxpayers in said county (exclusive of railroads and other public utilities) at only 61% of full market value.

6. The only changes made at the meeting of the county board of equalization in September, 1913, affected some property other than that of banks, railroads and other public utilities; but left the changed assessments at not more than 62% of full cash market value.

7. Before said meeting of said board, said assessor transmitted to The Colorado Tax Commission an abstract of the assessment of all taxable property in said county, showing:

Assessment through assessor's office.....	\$37,214,710
Assessment by said Commission, of railroads, etc.	16,474,330
Total	<hr/> \$53,689,040

Thereon the property of plaintiff and all other banks was correctly noted at full cash market value; but that of other taxpayers assessed through said assessor's office, at not to exceed 61% thereof.

8. In October, 1913, said Commission assumed to determine and recommend to the state board of equalization that the assessment of all taxable property in said county other than that of railroads and other public utilities should be raised horizontally 63%, or in all \$23,447,440.

9. On October 22, 1913, said state board adopted said recommendation and by resolution directed said increased assessment.

10. On said day said state board and said Commission severally gave written notice of said resolution to

the assessor of said county and directed him to change its assessment roll for 1913 accordingly.

11. Thereafter, about March 1, 1914, said assessor, obeying said instruction, delivered to the treasurer of said county a revised tax roll whereon plaintiff's assets were assessed for said year 1913, \$388,760, which exceeded by 63%, or \$149,760, the full cash market value of all plaintiff's net assets on April 1, 1913.

12. The aggregate tax levies for said year 1913—state, county, school district and municipal—applicable to plaintiff's property, were 16.8 mills on the dollar.

Because of said excessive valuation, the tax imposed against plaintiff for said year was made to appear as\$6,531.17

Said mill levy applied to the full cash market value of plaintiff's assets made its total just tax... 4,015.20

The result was an excessive and erroneous imposition of taxes amounting to.....\$2,515.97

13. In other counties the initial assessment of bank property was on the same basis as in Weld; but said Commission and state board did not recommend or direct a horizontal raise even approximating 63% in any other county; in several no increase was directed.

14. The result was that the property of banks in Weld county was assessed at 63% higher rate than that of other taxpayers therein and of bank assets in several other counties, and at a much higher rate than on bank property in any other county.

15. The levy imposed for all state purposes including state institutions was 1.3 mills on the dollar for said fiscal year.

Because of the premises, on the same state levy if the excess be not refunded, plaintiff and its shareholders will be deprived of rights protected by Sec. 5219, U. S. Rev. Stats.

16. On April 29, 1914, pursuant to Sec. 5 of an Act approved May 1, 1913—Colo. Sess. Laws 1913, p. 528—plaintiff filed with defendant its petition in triplicate praying for abatement and rebate of said \$2,515.97 of erroneous and excessive taxes, stating as grounds therefor the matters hereinbefore set forth. The assessor of said county received due notice; he recommended that the prayer of said petition be granted.

On May 12, 1914, defendant at a duly adjourned meeting after hearing, certified said petition with its approval to The Colorado Tax Commission. Thereafter said Commission returned said petition to defendant with its disapproval endorsed thereon, without stating any reason or ground for its said action.

The other banks in said county severally filed similar petitions resulting in like recommendations by assessor and by defendant and like disapproval by said Commission. By virtue of the premises, said Commission made a systematic, intentional and arbitrary discrimination against plaintiff and said other banks in said county.

17. Said petition of plaintiff was the first opportunity afforded it under Colorado statutes to seek redress. Its only remaining opportunity was to pay under protest said claimed excessive tax with interest and penalties and then by action at law to obtain a judicial finding that said exaction was erroneous, excessive and unjust, and judgment for its recovery. Such is the construction placed by the Supreme Court of Colorado on Sec. 5750, Colo. Rev. Stats. of 1908, as modified by said Sec. 5, page 528, Colo. Sess. Laws 1913.

18. In 1914, plaintiff paid \$4,015.20, the amount of tax which justly should have been imposed on it for 1913. On March 8, 1915, it paid, under protest, the further sum of \$2,717.24, which was the excessive, unjust and illegal taxation so wrongfully imposed with interest and penalties incident thereto.

19. On Feb. 18, 1921, plaintiff filed with defendant its claim and demand for audit, allowance and refund of said \$2,717.24. In so doing, it complied with Colorado statutes.

20. Defendant has not paid, or refunded, or ordered payment or refund, to plaintiff of said \$2,717.24, or of any part thereof.

21. The action of said administrative boards and of said officials and their failure to act as aforesaid, if redress be not afforded by judgment of this court, violates that provision of Sec. 3, Art. X of the Colorado Constitution, which provides:

All taxes...shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property.

Without such redress the State of Colorado, by its officials, under color of its legislation, has denied to plaintiff the equal protection of the laws and has deprived it of property without due process of law, contrary to Sec. 1 of the 14th Amendment to the Federal Constitution.

For Second Cause of Action:

For the full text thereof, see printed transcript of record, pages 23-27.

This cause of action is the same, *mutatis mutandis*, as the first, varying only as follows:

1. It covers taxation for 1914.
2. The market value of plaintiff's property, April 1, 1914, was \$231,744.
3. Taxable property in Weld county, except of banks and public utilities, was initially assessed that year at 80% of market value.
4. The horizontal raise directed that year, affecting all taxable property in the county except that of public utilities, was 25%. When ordered, no opportunity was afforded plaintiff to be heard.
5. Said horizontal raise caused the final assessment of plaintiff's property for that year to exceed its market value by \$57,936.

6. The aggregate levies against its property that year were 19.1 mills on the dollar, making the excessive tax imposed on plaintiff, \$1,106.58.

7. The levy for purposes of state and state institutions that year was 1.39 mills on the dollar.

8. Plaintiff paid \$4,426.30, the just part of the tax imposed, and paid under protest said excessive imposition, \$1,106.58—\$553.29 on March 9, and a like sum on July 31, 1915.

9. There is no averment of a petition for rebate and abatement before said payment under protest.

Prayer of Complaint.

It is for judgment that plaintiff have and recover from defendant \$3,823.82, viz., \$2,717.24 as refund of excessive taxes for 1913, and \$1,106.58 as refund of excessive taxes for 1914, and for costs of suit.

Printed Record, p. 27.

Demurrer to Amended Complaint.

Therein defendant charged:

1. That the first cause of action did not allege facts sufficient to constitute a cause of action.

2. The same regarding the second cause of action.

3. The same as to the whole complaint in both causes of action.

4. That the court had previously sustained general demurrer to the original complaint, asserting it to be the same in substance, purport and legal effect.

Printed Record, pp. 28-29.

Order and Judgment of Trial Court.

On September 29, 1922, argument was had on said demurrer which was sustained. On November 8, 1922, plaintiff elected to stand on its amended complaint. There-

upon judgment was entered that the defendant go hence without day and recover costs.

Printed Record, pp. 29-30.

Opinion of Trial Court.

The amended complaint was filed by leave of court to enable plaintiff to state the facts in better sequence and more concisely.

Printed Record, pp. 15-16.

The Court (Circuit Judge Carland presiding), in ruling on demurrer to the original complaint, filed written opinion stating:

1. This case is ruled by First National Bank v. Patterson, 65 Colo. 166.

2. In said case this plaintiff sought to have declared void the same alleged excessive taxation for 1913.

3. The statement in that opinion shows the same facts as here.

[Note by Counsel: This is inaccurate—payment under protest, demand for refund and action at law to recover, are facts in this case but not in that.]

4. Plaintiff there, as here, urged the following points:

a. Denial of equal protection of the laws, a violation of the 14th Amendment.

b. Taxation not uniform, thus violating Sec. 5219, R. S. U. S.

c. Plaintiff had taken all steps to secure relief through assessing officers.

d. That the action was properly brought at law under Sec. 21 of Colorado Code of Civil Procedure.

[Note by Counsel: This is inaccurate—see discussion of said case at pages 36-37, *post*.]

5. The court thereaffirmed the judgment of the lower court on the ground that the bill did not state facts sufficient to warrant the relief prayed, either at law or in equity.

[Note by Counsel: The deduction from said opinion that an action at law after payment under protest, would not lie, is challenged—see argument at pages 34-35, *post*.]

6. It was there held that under Sec. 5750, Colo. Rev. Stats. of 1908, a law action would lie to recover taxes when paid under protest—a matter previously in doubt as held by this court in *Union Pacific Railroad Company v. Weld County*, 247 U. S. 282.

7. But—says Judge Carland—the state court, before settling the practice, had held that said taxation for 1913 was valid.

8. The same reasoning applies to 1914 taxes involved in the second cause of action.

9. That opinion, so far as it touches matters arising under the Federal Constitution and laws, is not binding upon this court; but the case must be a clear one to authorize this court to disagree therewith.

Printed Record, pp. 40-41.

In sustaining demurrer to amended complaint, the trial court (District Judge Symes presiding) held that the substantial issues had been passed upon by Judge Carland and by the Supreme Court of Colorado in the case cited by him. Further, that the amended complaint did not materially differ from the original.

Printed Record, p. 41.

Questions Involved.

Plaintiff maintains:

1. The inequality in assessment of bank property in Weld county on rates 63% for 1913 and 25% for 1914 higher than on other taxable property therein, constitutes a denial of equal protection of the laws provided by the 14th Amendment of the Federal Constitution.

2. The Colorado statutes as enforced and construed by the administrative officials of the state and by its highest court (if its holding is correctly interpreted by the trial court herein) have deprived plaintiff of due process of law also guaranteed by said Amendment.

3. Said taxation of national banks (including plaintiff) in said county for state purposes on said higher rate than that of monied capital elsewhere in the state, violated Sec. 5219, R. S. U. S.

4. This case is not ruled by First National Bank vs. Patterson, 65 Colo. 166, for three reasons:

a. Neither the opinion nor the judgment in that case decided the merits of the litigation, but merely settled a question of practice, viz., that the only remedy was by action at law to recover after payment under protest.

b. On the assumption that said case held plaintiff to be without remedy at law after payment under protest, Judge Carland was correct in stating it would not bind the Federal courts, but erred in impliedly holding that this is not a clear case to authorize the trial court to disagree with the state court.

c. Said case is not pleaded as *res judicata* and cannot be, because it turned chiefly, if not wholly, on an incidental matter of practice, which precluded a direct review on error to that court.

5. The result in this case should be controlled by the principles announced in the following cases:

Greene v. Louisville & Interurban R. Co., 244 U. S. 499, 61 L. Ed. 1280.

Louisville & Nashville R. Co. v. Greene, 244 U. S. 522, 61 L. Ed. 1291.

Ill. Central R. Co. v. Greene, 244 U. S. 555, 61 L. Ed. 1309.

Pelton v. Com. National Bank, 11 Otto 143, 25 L. Ed. 901.

Cummings v. Merchants National Bank, 11 Otto 153, 25 L. Ed. 903.

Kendrick v. A. Y. & Minnie M. & M. Co., 63 Colo. 214.

Sioux City Bridge Co. v. Dakota County, 67 L. Ed. 220.

Taylor v. Louisville & N. R. Co., 31 C. C. A. 537, 88 Fed. 350.

III.

SPECIFICATION OF ERRORS ASSIGNED AND
RELIED ON.

We charge in the Assignment of Errors as numbered in printed record at pages 32 to 35, but here stated with more brevity, that the court below erred as follows:

Third: In sustaining general demurrer to the first cause of action in the amended complaint.

Fourth: In the same ruling against the second cause of action therein.

Seventh: In rendering judgment against the plaintiff when it elected to stand on its amended complaint.

Eighth: In holding that the charged excessive taxes against plaintiff for 1913 were held by the highest court of Colorado to be valid.

Ninth: In like holding regarding the charged excessive taxes for 1914.

Tenth: In holding that the Supreme Court of Colorado held that upon plaintiff paying under protest, the 63% of taxes charged to be excessive for 1913, an action at law does not properly lie under Sec. 5750, Colo. Rev. Stats. of 1908, to recover the same.

Eleventh: In holding, on the assumption that the highest court of Colorado has held that such an action at law does not properly lie, that said decision did not so construe Colorado statute law as to cause said state to deprive plaintiff of property without due process of law and to deny it the equal protection of the laws secured to it by the 14th Amendment of the Federal Constitution.

Twelfth: In holding that the State of Colorado, through its taxing officials and a decision of its highest court, had not deprived plaintiff of property without due process of law and had not denied it the equal protection of the laws secured to it by said amendment, on the assumption of the trial court that said state court has held that plaintiff as a member of a class, to-wit, banks in said

county, had lost its right to recover excessive taxes paid under protest on these untenable grounds:

a. Because it had not petitioned the county board of equalization to raise the assessed value of other classes of property in Weld county to the correct standard initially reported by and assessed against it.

b. Because it did not appear before The Colorado Tax Commission to demand of it, if it saw fit to make a horizontal raise, to exclude therefrom bank property in said county.

Thirteenth: In holding, in effect, that there was any provision of the Colorado statutes other than Sec. 5750 Rev. Stats. of 1908, wherein and whereby plaintiff was afforded due process of law to obtain redress for the assessment and consequent imposition of taxes for 1913 at a rate 63%, and, for 1914, 25%, higher than full market value, when such excess tax had not been assessed on property of taxpayers other than banks.

Fourteenth: In holding, in effect, by its rulings on said demurrers and by its judgment, that in assessing for taxation the property of plaintiff upon a ratio 63% higher, as compared with its full cash and market value, than was assessed against bank property and other monied capital in several other counties in the state and at a much higher rate than was imposed on such property in any other county, upon which assessment the same general state levies were imposed, that plaintiff is not entitled to judicial relief pursuant to the terms of Section 5219, U. S. Rev. Stats.

[N. B. In drafting the 14th assignment, the section of U. S. Rev. Stats. intended was inadvertently given as "5129" instead of "5219" as intended and as stated in complaint.]

Fifteenth: In denying to plaintiff the protection of the rule stated in Section 3, Article 10 of the Colorado Constitution, viz.:

"All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax",

because, on the admitted facts, the tax imposed upon plaintiff was the result of applying the same mill levy for general state purposes to a 63% higher valuation than on monied capital elsewhere in said state; whereby plaintiff was denied the equal protection of the laws, contrary to the 14th Amendment.

Sixteenth: In refusing to apply the rules defining just valuation prescribed by Sections 5591 and 5756 Colo. Rev. Stats. of 1908: (1) because the veto by the Colorado Tax Commission of the rebate sought by plaintiff and recommended by assessor and county board was not based on evidence of full cash or market value of plaintiff's property, but was an arbitrary act contrary to the letter, spirit and intent of Sec. 5, page 528, Colo. Sess. Laws of 1913; (2) because said veto operated to the injury of plaintiff and other banks of Weld county as a class, so that without redress under Sec. 5750, Colo. Rev. Stats. of 1908, plaintiff was denied the equal protection of the laws and deprived of property without due process of law, contrary to the 14th Amendment.

Seventeenth: In depriving plaintiff of its right under Sec. 3, Article X of the Colorado Constitution to have taxes imposed upon it under general laws which shall secure a just valuation of all property real and personal; because plaintiff and the other banks in Weld county as a class were taxed by applying the aggregate mill levies for 1913 on 163% of full cash market value thereof, while the same mill levies were imposed on not to exceed 100% of said value of all other taxable property in said county; whereby, without granting redress to plaintiff after paying under protest the excessive part of said tax, pursuant to Sec. 5750 of Colo. Rev. Stats. of 1908, plaintiff has been denied due process of law and the equal protection of the laws, contrary to the 14th Amendment.

Printed Record, pp. 32-35.

The 1st, 2nd and 5th assignments charge error in the rulings on demurrer to the original complaint; while relied

on, they need no special consideration; the 4th requires no separate treatment because the same legal principles must govern for the excessive taxation for 1914 as for 1913; the 6th combines the 3rd and 4th; the 3rd, 4th and 7th are involved in all the others.

IV.

BRIEF OF THE ARGUMENT.

The Facts.

Since the demurrer to amended complaint admits all facts well pleaded, we now precede discussion of the law applicable thereto by restating the essential facts more briefly, as follows:

1st Cause of Action:

1. The full cash market value of all the property of plaintiff, a national bank, on April 1, 1913—the assessing date—was \$239,000. Plaintiff duly reported said value.

2. The assessor accepted said report as correct. Neither he nor the county board of equalization made or notified plaintiff of any change in its said valuation which was placed on the initial assessment roll.

3. The property of railroad companies and of other public utilities in said county was assessed by the Colorado tax commission at full cash market value and no more.

4. The taxable property in said county other than that of the banks, railroads and other public utilities, was initially assessed by assessor and said county board of equalization at a rate of not to exceed 62% of full cash market value.

5. The Colorado Tax Commission (created by statute in 1911) in October, 1913, without hearing, determined the aggregate of all taxable property in said county, except that of railroad companies and other public utilities, had been under-assessed to extent of upwards of twenty-three million dollars. It recommended to the State Board of Equalization a 63% horizontal raise on said assessment.

Said state board passed a resolution to that effect and ordered the assessor to prepare his revised tax roll accordingly. This was done. It resulted in extension on the tax roll of said county for the fiscal year 1913 of an assessment on a just and fair approximation to full market value of all taxable property except that of the banks, but as to the latter, caused their assessment to be 163%. In no other county was such excessive assessment imposed on bank assets. They were subject to the same levy for state purposes.

6. Before making payment, plaintiff bank, pursuant to Sec. 5750, Colo. Rev. Stats. of 1908 (page 56, *post*) petitioned for rebate of the 63% excess tax resulting from applying the mill levies to said over-assessment. Each other bank in the county did the same. The Colorado Tax Commission, under color of its statutory power of veto—Colo. Sess. Laws 1913, Sec. 5, page 528 (pp. 64-5, *post*)—disapproved said rebate without obeying the statutory call for statement of its reasons, though said rebate was recommended by assessor and the defendant board.

7. In 1914 plaintiff paid the just part of the tax imposed, viz., the result of applying the mill levies of the state, county, school district and municipality to 100% of the full cash market value of its assets. On March 8, 1915, it paid under protest the disputed 63% excess with interest and penalties demanded, viz., \$2,717.24. After duly applying for a refund thereof without action by defendant and in accord with said Sec. 5750, it began this suit (*ante*, pp. 2-6).

2nd Cause of Action:

This is the same as the 1st, *mutatis mutandis*. It pertains to the excessive taxation for 1914 when the horizontal raise was 25%. The payment under protest was \$1,106.58. There was no petition for rebate and abatement before said payment (*ante*, pp. 6-7).

Classification of Argument.

We discuss the case under four general topics, viz.:

1. Denial of equal protection of the laws. This covers the 11th, 12th, 15th, 16th and 17th assignments.

2. Denial of due process of law. This is raised by the 11th, 12th, 13th, 16th and 17th assignments.

3. Deprivation of rights under Sec. 5219 U. S. Rev. Stats.—the 14th assignment.

4. The opinion in *First National Bank v. Patterson*, 65 Colo. 166, does not preclude plaintiff from relief. This subject is presented by the 9th, 10th, 11th, 12th and 13th assignments.

[Note: Parts of Colorado Constitution and statutes referred to are copied in subdivision V in nature of an appendix. References thereto in the brief will be to pages hereof where the text appears.]

FIRST.

DENIAL OF EQUAL PROTECTION OF THE LAWS.

Plaintiff's property was appraised according to an arbitrary method producing results wholly unreasonable. To refuse a refund deprives it of the equal protection of the laws and violates the 14th Amendment.

Authorities Relied On:

Colorado Constitution, Article 10, Section 3 (*post* page 39).

Colo. Rev. Stats. of 1908, Secs. 5529, 5573, 5591, 5754, 5756 and 5750 (*post*, pages 40-43).

Kendrick v. A. Y. & Minnie M. & M. Co., 63 Colo. 214.

Greene v. Louisville & Interurban R. Co., 244 U. S. 499, 507-17; 61 L. Ed. 1280, 1285-9.

Louisville & Nashville R. Co. v. Greene, 244 U. S. 522, 61 L. Ed. 1291.

Ill. Central R. Co. v. Greene, 244 U. S. 555, 61 L. Ed. 1309.

Union Tank Line Co. v. Wright, 249 U. S. 275, 283, 63 L. Ed. 602, 607.

Cummings v. Merchants National Bank, 11 Otto 153, 25 L. Ed. 903.

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. Ed. 78, Syl. 3.

Sioux City Bridge Co. v. Dakota County, 67 L. Ed. 220, 223.

Taylor v. Louisville & N. R. Co., 31 C. C. A. 537; 88 Fed. 350, 364, 365.

Section 3, Article X, Colorado Constitution (*post* page 39) requires two things: (1) that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax; (2) that they shall be levied and collected under general laws which shall secure a just valuation for taxation of all taxable property, real and personal.

Both these provisions are violated in this case; 1st, by imposing upon bank property in Weld county a much higher rate of taxation than on the same class of property in other counties; 2nd: by imposing a 63% higher rate on bank property in said county than on all other taxable property therein.

Colo. Rev. Stats. of 1908, Sec. 5529 (*post*, page 40) requires all taxable property to be listed, valued and assessed at its "full cash value" thus interpreting the constitutional words, "just valuation".

Sec. 5573 (*post*, page 41) requires every inhabitant to deliver to the assessor a correct schedule of all his personal property and to set down the "full cash value" of each item thereof.

Sec. 5591 (*post*, page 41) provides: that in determining "the true value" of taxable property * * * "the market value" shall be the guide and said section shall control both county assessors and state board of equalization.

Sec. 5754 (*post*, pp. 42-3) provides, regarding any banking association, state, national or otherwise, that its capital stock shall be assessed "in all respects the same as similar property belonging to other corporations and individuals."

Sec. 5756 (*post*, page 43) requires an official of each national bank to make a sworn statement to the assessor of "the market value" of its stock or if without market value, then the "actual book value".

These varying statutory phrases interpret the words "a just valuation" in said section of the Constitution.

The Supreme Court of Colorado, in stating the reason for the creation of a Colorado tax commission, has well said:

Accordingly, it became manifest that full cash value is the only standard that is just and uniform, and whereby each citizen can be required to contribute to the support of government according to the value of his property. For, so long as the prevailing practice of assessing property in different localities at figures varying from 25 to 100% of its cash value, there will be gross inequalities in distribution of the tax burden.

People ex rel. Colorado Tax Commission v. Pitcher, 56 Colo. 343, 377.

This Court, by Mr. Justice Miller, says:

The phrases, "salable value", "actual value", "cash value", and others used in the directions to assessing officers, all mean the same thing, and are designed to effect the same purpose.

Cummings v. Merchants National Bank, 11 Otto 153, 163, 25 L. Ed. 903, 906.

This Court, speaking by Mr. Chief Justice Taft, has said:

The dilemma presented by a case where one or a few of a class of taxpayers are assessed at 100 per cent. of the value of their property, in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage, in violation of the law, has been often dealt with by courts, and there has been a conflict of view as to what should be done. There is no doubt, however, of the view taken of

such cases by the Federal courts in the enforcement of the uniformity clauses of state statutes and constitutions, and of the equal protection clause of the 14th Amendment.

Sioux City Bridge Co. v. Dakota County, 67 L. Ed. 220, 222-3.

Following said excerpt the opinion states that the exact question was considered at length in *Taylor v. Louisville & N. R. Co.*, 31 C. C. A. 537; 88 Fed. 350, 364, 365. The opinion in that case was prepared by the present Chief Justice, then Circuit Judge and was approved and in part incorporated in the opinion of this court in *Greene v. Louisville & Interurban R. Co.*, at pages 516-518 of 244 U. S. From said opinion so approved we excerpt the following:

The sole and manifest purpose of the Constitution was to secure uniformity and equality of burden upon all the property in the state. * * * We have before us a case in which the complaining taxpayer, and other taxpayers owning the same species of property are taxed at a higher rate than the owners of other species of property. This does not come about by legislative discrimination, but by the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant and its fellows of the same class. * * * The court is placed in a dilemma, from which it can only escape by taking that path which * * * does injury to no one and secures that uniformity of tax burden which was the sole end of the Constitution. To hold otherwise is to make the restrictions of the Constitution instruments for defeating the very purpose they were intended to subserve. It is to stick in the bark, and to be blind to the substance of things.

The Supreme court of Colorado held that the remedy of a property owner, because of the levy of an excessive tax on his property based upon the action of the state board of equalization in 1913, is to pay the tax and pro-

ceed under Colo. Rev. Stats. of 1908, Sec. 5750 (*post*, page 56).

Kendrick v. A. Y. & Minnie M. & M. Co., 63 Colo. 214.

The plaintiff in said case (defendant in error above) was owner of a producing mine in Lake county. Its property was initially assessed by the assessor in all respects as provided by law. The horizontal raise imposed by the Colorado Tax Commission and State Board of Equalization on October 22, 1913, was 15.52% for that county. The plaintiff there paid a tax equal to the levies on its original assessment only, and sought an injunction to prevent the county treasurer from selling its property because of its failure to pay more. The Court held that it had a plain, speedy and adequate remedy at law. Its duty was to pay the whole of the tax as finally assessed and then to proceed at law under Sec. 5750, Colo. Rev. Stats. of 1908. Plaintiff in the case now at bar has followed that direction.

The Kendrick case pertained to mining property in Lake county; the present one, to banking property in Weld county. The horizontal raise there was 15.52%; here, 63%. Said case can not be distinguished in principle from this one.

The Colorado Constitution and statutes pertaining to taxation properly interpreted and enforced, provide for equal protection of the laws. But the conduct of the officials thereunder coupled with the view taken by the trial court herein as to the effect of the decision of the highest court of the state in *First National Bank v. Patterson*, 65 Colo. 166, has deprived plaintiff and other banks in Weld county as a class, of the equal protection of the laws guaranteed by the 14th Amendment.

If said decision overrules the Kendrick case, 63 Colo. 214, and the court below in effect so held—then one class of taxpayers in one county have a remedy at law, and another class in another county with the same grievance do not.

SECOND.

DEPRIVATION OF DUE PROCESS OF LAW.

Paragraph 17 of 1st cause of action in amended complaint (printed record, page 22) alleges that plaintiff's petition to defendant for rebate was its first opportunity to seek redress, and that its only remaining opportunity was to pay under protest the unjust part of the tax and then, by action at law, to ask for a judicial finding that the exaction complained of was erroneous, excessive and unjust and for judgment, pursuant to Sec. 5750 of Colo. Rev. Stats. of 1908 (*post*, page 56). Plaintiff has taken both of said steps, hitherto without avail.

The 8th paragraph of the 2nd cause of action (printed record, pages 24-5) avers in effect that from the very nature of the order directing the horizontal raise, plaintiff had no opportunity for redress before such order was made and before its result was spread on the tax roll.

These averments, if correct, show that the only remedies open to plaintiff were:

1. Pursuant to Sec. 5, page 528, Colo. Sess. Laws 1913 (*post*, pp. 64-5) to petition the county board to rebate the excessive part of the tax.

2. When, because of the veto of the commission, that remedy failed, by this action at law pursuant to said Sec. 5750.

Since said averments savor of conclusions of law and therefore may be challenged by the demurrer, it is proper for plaintiff to show their correctness. Our position is, no redress was available to plaintiff under Colorado statutes before the county board of equalization, before the Colorado Tax Commission or in any manner other than as above stated. We maintain:

1. Before beginning this action, plaintiff exhausted in vain every opportunity afforded it for redress by administrative officials.

2. That its right to prosecute this action under said Sec. 5750 is the only due process of law afforded it.

3. That said remedy lies in all cases after payment of an unjust or excessive tax. By its terms it can be resorted to "in all cases where any person shall pay any tax . . . or any portion thereof that shall thereafter be found to be erroneous . . . whether owing to erroneous assessment . . . or other errors."

Authorities Relied On:

- Kendrick v. A. Y. & Minnie M. & M. Co., 63 Colo. 214.
First National Bank v. Patterson, 65 Colo. 166, syl. 3, see pages 174-176.
Greene v. Louisville & Interurban R. Co., 244 U. S. 499, 521; 61 L. Ed. 1280, 1291, syl. 9.
Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. Ed. 78.
Cummings v. Merchants National Bank, 11 Otto 153, 25 L. Ed. 903.
Sioux City Bridge Co. v. Dakota County, 67 L. Ed. 220, 223.

An analysis of all the provisions of the Colorado Constitution and statutes whereby any opportunity is afforded an aggrieved taxpayer to seek redress against an unjust tax prior to payment, next follows. It shows plaintiff had no opportunity for such redress, since the commission vetoed its effort to obtain rebate, and that the only due process afforded it is this suit. A different construction denies it due process of law under the 14th Amendment.

No Remedy Prior to October Meeting of Commission.

THE COLORADO CONSTITUTION, ART. X, SEC. 15 (*post* page 40) provides for a state board and a county board of equalization. It confers upon said state board power to adjust and equalize the valuation of taxable property among the several counties, and on the county board, like power as to the valuation of taxable property within its county, and further states: "Each board shall also perform such other duties as may be prescribed by law".

SECTION 5639, REV. STATS. '08 (*post*, pp. 45-6) permits any taxpayer whose property has been assessed illegally to appear before the assessor for correction. It provides that prior to the first Tuesday in August the assessor shall notify by mail any taxpayer whose property he has assessed at a different valuation than that given in his schedule and shall publish notice that at a date therein named he will sit to hear objections. Said hearing shall precede the first meeting of the county board of equalization in September.

SEC. 5640 (*post*, pp. 46-7) provides that in cases arising under Sec. 5639, where the assessment of the complaining taxpayer exceeds \$7,500, such complainant shall state in writing the particular ground of his grievance. If his objection is overruled by the assessor, that official must briefly state in writing the grounds of his refusal and an appeal from the assessor's decision to a court of record is allowed.

These two sections do not apply to plaintiff's situation here, as the assessor correctly followed its own schedule.

SEC. 5761 (*post*, pp. 47-8) provides that the county board of equalization shall sit to adjust and equalize the assessment among the several taxpayers of the county. It shall hold two regular meetings each year, the first beginning the first Tuesday in September and continuing not more than ten days; the second, on the third Tuesday of the same month and continuing not more than ten days. If said board makes or directs any change in the assessment of any person at its first meeting, the county clerk promptly after the close thereof, shall mail to each of such persons notice of such change. At its second meeting, the board shall hear complaints only from those dissatisfied with the changes and adjust the assessment so as to equalize it among the several taxpayers.

Obviously, plaintiff was not afforded due process under this section to induce the county board of equalization to perform its public duty to raise the assessment of other taxpayers. Its own assessment was unchanged and it was not notified to appear.

This subject has been passed on by this court in a case coming up from Kentucky, where its county board of equalization had the same or similar powers. The court by Mr. Justice Pitney says:

It is contended.....that the law of the state provides a method by which, instead of lowering the assessments upon the property of appellees, they could by proper procedure compel the assessment of the property of other taxpayers to be increased so as to come within the constitutional requirement as to fair cash value, and hence that it was the duty of appellees to adopt that method. The reference is to §§4115-4120, Ky. Stat., which require the county board of supervisors to convene annually and make a careful examination of the assessor's books and each individual list thereof, empowering them to increase or decrease any list; "but the board shall not reduce or raise any assessment unless the evidence be clear and unmistakable that the valuation is not a fair cash value". By §4123, they may hear complaints, summon and swear witnesses, and require them to testify. There is nothing in these provisions to indicate that parties in the situation of the present appellees, who have no different interest in the undervaluation by the county assessors than that which might be possessed by any other citizens of the state, are entitled to be heard to complain that the county assessments are too low. Nor is any case cited where such a complaint has been entertained. The remedy of reassessment appears to be a public, not a private, remedy.

Green v. Louisville & Interurban R. Co., 244 U. S. 499, 521; 61 L. Ed. 1280, 1291.

It is thus clear that plaintiff did everything required of it prior to the meeting of the Colorado Tax Commission in October, 1913. It had a right to suppose that the county board of equalization would perform its public

duty to bring the assessment of other taxpayers to the correct standard. Moreover, it could justly expect that the Colorado Tax Commission would perform its statutory duty to cause the assessor properly to value the property of other taxpayers.

Section 5636 of Revised Statutes of 1908 (*post*, page 45) prior to 1911 had authorized the state board of equalization, upon reasonable notice to the assessor to require him to make such corrections and additions to his assessments as would make the same accord with requirement of the law.

By Section 40, pp. 625-6, Session Laws of 1911 (*post*, page 63) and by the Act of 1913, p. 525, Section 1 (*post*, page 63) said duties were conferred upon said Commission.

Moreover the Commission was given very comprehensive power to compel the assessor to perform his statutory duty to assess at full value.

By Section 11, p. 615, Session Laws of 1911 (*post*, page 58) it was authorized to employ necessary examiners, expert accountants, etc., to that end.

By Section 13, pp. 615-18 of the same act (*post*, pages 59-60) it was given full power prior to its October meeting to supervise both assessor and county board in causing the assessments to be made just and uniform at full cash value of property; to visit each county, to reappraise any item or class of property, to the end that all classes in each county should be assessed according to law; to raise the assessed value of any real or personal property after first giving notice to the owner or owners thereof for a hearing within the county.

The powers and duties created by said statutes were thrown upon the Commission as a public body. It did not devolve upon plaintiff after properly reporting the full value of its own property to spur the Commission to perform its said public functions. It had a right to expect officials to discharge said public duties without instigation

from an individual taxpayer. It is a travesty on justice to punish plaintiff for dereliction of public officers.

**Futility of Complaint Before Commission or State Board of
Equalization at October Meeting.**

A flat or horizontal raise would have been unnecessary had the Commission discharged the public duties above referred to.

The Act of 1911 gave the Commission another method of getting undervalued property in a county up to the true standard provided it neglected to follow the more correct and arduous method.

Section 31, p. 623 of that Act (*post*, page 61) provided what could be done if in October said Commission was of opinion that property in a county not initially assessed by it, had in the aggregate been undervalued. In such case, the Commission could determine what percentage of increase would bring the aggregate to full cash value. The direction of such flat or horizontal raise was distinctively a public function. The theoretical opportunity for a hearing at instance of an individual taxpayer or some class of taxpayers in a county would be futile. No appeal to a judicial tribunal was provided should complaint of any taxpayer be rejected at said meeting. The time at the disposal of the Commission was inadequate to hear individual complaints which might come from more than sixty counties.

The statutes provide a remedy for a taxpayer against whom such horizontal raise would work injustice after the excessive tax against him was spread on the tax roll, to petition for a rebate under Section 5, p. 528, Session Laws of 1913 (*post*, pp. 64-5) and that failing, by paying the excess and bringing an action at law under Section 5750, Rev. Stats. of 1908 (*post*, page 56).

Kendrick v. A. Y. & Minnie M. & M. Co., 63 Colo.
214.

First National Bank v. Patterson, 65 Colo. 166,
175-6.

If it be urged that there are expressions militating against this view in the opinions of the Supreme Court of Colorado in *People ex rel. Colorado Tax Commission v. Pitcher*, 56 Colo. 343, and in *State Board of Equalization v. Bimetallic Inv. Co.*, 56 Colo. 512, which last case was affirmed by this court in *Bimetallic Inv. Co. v. State Board of Equalization*, 239 U. S. 441; 60 L. Ed. 372, the answer is that in those cases injunctions were sought to prevent the directed flat raise of 40% in the City and County of Denver being extended by the assessor thereof on the tax roll. The court assumed in those cases that all property in Denver (except railroads and other public utilities) had previously been placed on relative equality by the assessor and county board of equalization. The pleaded facts in the case now at bar rebut said assumption here.

In said *Bimetallic* case it was also assumed that if the *Bimetallic Inv. Co.* had had its property previously valued in full, it had "had its opportunity to protest and appeal as usual in our system of taxation". This assumption cannot be indulged in in the instant case. Our analysis of the Colorado statutes, *supra*, shows that this plaintiff had had no opportunity to protest or appeal to any court before the flat raise was imposed. It could not ask to have its assessment reduced below its own correct valuation because of the pressure in 1913 to cause all property to be assessed at full cash value. To bring other property to the correct standard was a *public duty* of assessor, county board of equalization and the Commission, not one devolving upon plaintiff. Under Kentucky statutes, in all respects analogous, we have shown this court has held that due process was not afforded thereby.

Greene v. Louisville & Interurban R. Co., 244 U. S. 499, 521; 61 L. Ed. 1280, 1291.

That the Supreme Court of Colorado by such expressions did not intend to deprive a taxpayer correctly assessed before the raise, of his remedy under Section 5750, is evidenced from its opinion in *Kendrick v. A. Y. & Minnie M.*

& M. Co., 63 Colo. 214. It was not claimed in said case that the mining company had asked for a hearing before the Colorado Tax Commission at its October meeting or sought redress in any manner before suit.

No Remedy Afforded During the Levying Process.

The mill levies in Colorado are made by sundry bodies, viz.:

For general state purposes and those of state institutions by the General Assembly, or by the state board of equalization.

Colorado Constitution, Article X, Section 2 (*post*, page 29).

Rev. Stats. of 1908, Sec. 5671, p. 1337 (*post*, page 49).

For the Agricultural College:

Rev. Stats. 1908, Sec. 109, p. 203 (*post*, pp. 49-50).

For the Insane Asylum:

Rev. Stats. of 1908, Sec. 4150, p. 1049 (*post*, page 50).

For the Deaf and Blind Institution:

Rev. Stats. of 1908, Sec. 4329, p. 1083 (*post*, page 50).

For State School of Mines:

Rev. Stats. of 1908, Sec. 6025, p. 1417 (*post*, pages 50-1).

For State Normal School:

Rev. Stats. of 1908, Sec. 6127, p. 1438 (*post*, page 51).

For State University:

Rev. Stats. of 1908, Sec. 6952, p. 1618 (*post*, page 51).

For general, county, school and other county purposes:

By the Board of County Commissioners.

Rev. Stats. of 1908, Sec. 5760, pp. 1358-9 (*post*, page 52).

For city or town purposes:

By City Council or Board of Trustees of a town.

Rev. Stats. of 1908, Sec. 5652, p. 1549 (*post*, page 52).

For school district purposes:

By certification of a school board in each district to the Board of County Commissioners and then by said county board in conformity therewith.

Sec. 1, p. 585, Session Laws of 1911 (*post*, page 58).

As illustrative of the fact that the General Assembly of 1913 was aware that the drastic powers conferred upon the Colorado Tax Commission would make a very heavy increase in the assessed valuation of the property of the state, in that year it was enacted that all statutory rates making provision for fixing the limit of indebtedness are decreased in the same proportion as the assessed valuation of the taxing districts to which they apply is increased; and also that all statutory rates making provisions for the revenue of the state, state institutions, schools, towns, cities and for all other purposes "are hereby so reduced as to prohibit the levying of a greater amount of revenue on the assessed value of the year 1913 than was levied for the year 1912 plus 15%.

Laws 1913, Sec. 11, p. 560 (*post*, page 66).

This provision will be violated as against plaintiff if it be not afforded relief in this case.

We have referred to the statutes governing levy, that the court may be fully advised as to the due order of proceedings under the Colorado system of raising revenue. No taxpayer is afforded any formal hearing on the subject of levies.

**Opportunities to Seek Relief after Final Extension
of Taxes on Roll.**

Prior to 1911, SECTION 5750, REV. STATS. OF 1908 (*post*, page 56) was practically the only remedy. Before that time the Supreme Court of Colorado and its Court of Ap-

peals construed said section as giving almost plenary power to the county board to grant relief either before or after payment.

Breeze v. Haley, 10 Colo. 5, 12.

Pilgrim C. M. Co. v. Teller County, 20 Colo. App. 311, 313.

County Comms. Bent Co. v. A. T. & S. F. Ry. Co., 52 Colo. 609, 614.

SESSION LAWS OF 1911, SECTION 14, p. 618 (*post*, page 60), empowered the Commission to direct the county commissioners to remit taxes and penalties thereon found by it to be illegally assessed because of neglect or error of any fiscal official. Said power was conditioned on ten days' notice served on the county attorney and assessor on application for such remission.

SESSION LAWS OF 1911, SEC. 15, p. 618 (*post*, pp. 60-1), authorized the Commission to receive complaints and carefully to examine into all cases where it was alleged, *inter alia*, that property had been for any reason improperly or unfairly assessed.

A more effective method to seek administrative redress was provided in 1913. SECTION 5, p. 528, SESSION LAWS OF 1913 (*post*, pp. 64-5), forbids the county commissioners to make any abatement, rebate, or refund of taxes until after a hearing and until after its recommendation thereof has been certified to the Commission, and then not to be effective unless said Commission should endorse its approval thereof. It further provides that a disapproval of said Commission should be endorsed on the petition, which then should be returned to the county board, with statement of the Commission's reasons for disapproval.

Under that section a more speedy method of ascertaining the views of the Commission was afforded than under Sections 14 and 15, *supra*, of the Act of 1911.

In the case at bar, the pleaded facts show regarding the excessive taxes of 1912 that plaintiff strictly complied with said Act of 1913 and obtained recommendation of the county

board and assessor for the rebate asked, but that the same was arbitrarily disapproved by the Commission without performing its statutory duty to state its reasons for such disapproval. After the Commission's attitude was thus determined, it would of course have been futile to proceed under Sections 14 and 15 of the Act of 1911.

Having thus shown that every effort for administrative relief was exhausted, this suit based on Section 5750 is the only remedy left this plaintiff.

The effect of said SECTION 5, p. 528, SESSION LAWS OF 1913, left grave doubt whether an action at law could thereafter be brought under SECTION 5750 OF REV. STATS. OF 1908. Before that doubt was solved by the Supreme Court of Colorado, this court held that an aggrieved taxpayer could seek his remedy by injunction against collection of a claimed excessive tax for the year 1912.

Union Pac. R. R. Co. v. Weld County, 247 U. S. 282; 62 L. Ed. 1110.

The Supreme Court of Colorado referring to the case last cited, settled said problem as follows:

It becomes necessary to determine the effect of the new section on the old section. We are of the opinion that it does not substantially affect the continued existence of the right conferred upon the taxpayer to recover from the county an illegal or erroneous tax he has paid. It may be conceded that the new section prohibits any voluntary refunding of taxes by the county board of commissioners, save in instances having the approval of the state tax Commission. But this in no sense takes away the right of the taxpayer given by the old statute to sue. The true meaning of §5750 is to impose a liability upon the county in favor of a taxpayer who pays an illegal or erroneous tax, and a corresponding duty upon the commissioners, as agents of such county, to refund the same. The effect of the new section in nowise removes that liability, or deprives the taxpayer of

his right to maintain a suit therefor, but only takes away the right of the commissioners, without first obtaining the approval of the tax Commission, to refund the tax until it is "found" by judgment of a court of competent jurisdiction that the tax is erroneous or illegal, establishing the liability of the county. In other words, without the approval of the tax Commission, it may not be "found", except by judgment of a court, that the tax is illegal or erroneous.

First National Bank v. Patterson, 65 Colo. 166, 175-6.

Said opinion on rehearing was handed down December 2, 1918.

Without entering into a discussion of the effect of said Section 5, of the Act of 1913 called for by the intervening opinion of this court, the Colorado Supreme Court had reached the same conclusion in a case wherein the opinion was handed down May 7, 1917.

Kendrick v. A. Y. & Minnie M. & M. Co., 63 Colo. 214.

In the Compiled Laws of Colorado of 1921, where said Section 5750, R. S. '08, appears as Section 7447, the learned compiler in a note, citing said First National Bank v. Patterson, says:

The right given herein to recover from the county an illegal or erroneous tax paid, is not substantially affected by Section 7460.

[Said Section 7460 of Compiled Laws of 1921 is the same as Section 5, p. 528, Session Laws of 1913 (*post*, pages 64-5)].

Said compiler also in a note to said Section 7447, cites, Spaulding Mfg. Co. v. La Plata County, 63 Colo. 438, to these words:

A county is liable to one who pays a tax imposed without authority of law, and an unsatisfied judgment by the taxpayer against the collector is no bar to his

action against the county, though the collector made no return to the county and converted the money to his own use.

In a note to said Section 7460 [being said Section 5, p. 528 of the Act of 1913] the compiler says:

This section does not substantially affect the continued existence of the right conferred on a taxpayer by Section 7447, to recover from the county an illegal or erroneous tax which he has paid, citing *First National Bank v. Patterson*.

THIRD.

PLAINTIFF'S RIGHTS UNDER §5219, U. S. REV. STATS. VIOLATED.

The pleaded facts show that plaintiff and its shareholders, for state and state institutions purposes were subjected to a higher tax than monied capital in all other counties in Colorado. Plaintiff, as one of an aggrieved class of taxpayers in Weld County, is therefore entitled to judicial protection under said section which forbids taxation of national bank shares "at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such state".

Whitbeck v. Mercantile Natl. Bank, 127 U. S. 198;
32 L. Ed. 118.

Mercantile Natl. Bank v. Hubbard, 105 Fed. 809.

Pelton v. Commercial Natl. Bank, 101 U. S. 143;
25 L. Ed. 901.

FOURTH.

FIRST NATIONAL BANK V. PATTERSON, 65 COLO. 166.

The First National Bank of Greeley on September 9, 1914, after paying what it concedes to be its just tax for the year 1913, filed its bill of complaint in district court of Weld county against Patterson as county treasurer praying an injunction to prohibit collection of the excess tax.

On September 16, 1914, said treasurer Patterson demurred to said complaint stating as grounds thereof that plaintiff's only remedy was an action at law; that plaintiff had not exhausted every other remedy; and that the bill of complaint failed to allege any equity. The district court sustained said demurrer and dismissed the case. Thereupon the bank prosecuted a writ of error from the Supreme Court of Colorado. The contentions of the bank in that case are stated by the Supreme Court in its opinion. All the briefs therein except those for rehearing were filed long prior to the decision of *Kendrick v. A. Y. & Minnie M. & M. Co.*, 63 Colo. 214.

In seeking an injunction in that case, the bank relied upon the case of *Cummings v. Merchants National Bank*, 101 U. S. 153, as well as many other cases.

The right to bring an action at law under Section 5750 Colorado Rev. Stats. of 1908 (*post*, page 56), because of Section 5, p. 528, Colorado Session Laws of 1913 (*post*, pp. 64-5), was in grave doubt.

The A. Y. & Minnie M. & M. Co. in another county after paying taxes equal to the levies on its original assessment, brought suit against county treasurer Kendrick for an injunction to prevent collection of an excessive tax based on a horizontal raise of 23.42% in that county, said plaintiff having been initially assessed correctly.

The trial court enjoined Kendrick. The Supreme Court of Colorado reversing the trial court in that case in an opinion handed down May 7, 1917, said:

The law has provided a plain, speedy and adequate remedy at law for the hearing and determination of the grievances of plaintiff. It was the duty of complainants in this case to have paid the whole of the tax assessed, and to have proceeded under authority of Sec. 5750, Rev. Stats. 1908.

Kendrick v. A. Y. & Minnie M. & M. Co., 63 Colo. 214, 215.

In the opinion in *First National Bank v. Patterson*, the court does not overrule the decision in said *Kendrick* case, but reaches the same conclusion. At page 174 of 65 Colo., it says:

Mere errors or excess in valuation, or hardship, or injustice of the law, or any grievance which can be remedied by application to agencies especially invested with power to act in the premises, either before or after payment of taxes, do not call for a court of equity to interpose by injunction to stay collection of a tax.

Again on the same page, the court says:

If the tax was not legally imposed, plaintiff in error could, *upon payment thereof*, recover the same from the county under the provisions of §5750 R. S. 1908.

The last two pages of said opinion (an excerpt from which has been made at pp. 31-2, *ante*) are devoted to the opinion of this court in *Union Pacific R. R. Co. v. Weld County*, 247 U. S. 282.

At page 175, the court says:

In a single action at law under the statute, it [plaintiff] could protect itself and its shareholders, for whom it stands as trustee in the premises.

At page 176, the court says:

We see nothing in the record which requires a court of equity to extend relief to plaintiff in error. All the Justices concur, but Chief Justice Hill and Mr. Justice Teller desire to have it stated that they concur in the conclusions only.

We submit from these excerpts that it was not the intention of the Colorado Supreme Court to decide that the plaintiff in that case was without remedy for this excessive tax after paying it under protest and then suing at law for recovery under Section 5750. If such had been its intention, it is very strange the court did not overrule the *Kendrick* case.

In the opinion, *arguendo*, are certain expressions which may lend some color to the contention that its writer intimated the bank had been derelict in refraining from seeking relief before the assessor, county board of equalization or the Colorado Tax Commission. The judgment of the court in affirming the trial court was not based upon such expressions but on the excerpts from the opinion we have above cited herein.

Said excerpts from the opinion and a careful reading thereof we believe make clear that the trial court herein (Judge Carland presiding) erred in reaching the conclusion that the highest court of Colorado had held plaintiff was without remedy in an action at law after payment under protest brought pursuant to Section 5750 R. S. 1908, being Sec. 4747 of Compiled Laws. It could not have been the intention of the Colorado court (without mentioning it) to overrule the Kendrick case at 63 Colo. 214-15.

The learned trial judge was also in error in stating that the facts presented in First National Bank v. Patterson, were the same as in that at bar. *There* when the case left the court below no payment of the disputed part of the tax was shown. *Here* it is. That case was a complaint in the nature of a bill in equity to enjoin the county treasurer from collecting by distraint the alleged excessive tax. This one is one at law based on an express statute construed in that case to be applicable.

It is true that in the former case counsel urged that since the Code had abolished the distinction between suits in equity and actions at law, the case might be treated as one at law with request for temporary injunction as merely ancillary thereto. In that behalf counsel urged that Section 21 of the Colorado Code (*post*, page 67) permitted a person against whom an alleged liability was claimed to bring an action to determine the validity of such claim; that such action might be treated as one at law, even though ancillary injunctive relief was sought. While the Colorado Supreme Court refers to this contention as having been made, it does not express its views thereon. Throughout its

opinion it treats the case as essentially one in equity. It may well be that it regarded Section 21 of the Code as inapplicable, when such a suit against a county treasurer before payment was sought to take the place of an action at law against the board of county commissioners under an express statute calling for payment of the contested tax before suit.

But if the learned trial judge placed a correct interpretation on what the state court had held, he also decided (beyond dispute correctly) that such state decision would not be controlling on a Federal question in a Federal Court in a clear case. By implication he seems to have held that this is not a clear case to justify a departure from such supposed holding of the state court when the equal protection and due process clause of the 14th Amendment and a section of a Federal statute is relied on.

We maintain a clearer case of denial of equal protection and deprivation of due process has never been presented.

Since the case in 65 Colo. turned chiefly (we maintain wholly) on a question of procedure no writ of error lay from this court to review it. Plaintiff took the course suggested by the highest court of the state. It paid under protest the excessive taxes involved and brought this action at law.

It may be appropriate to state that the other banks in Weld county, each of whose claims of similar nature to that at bar involved less than \$3,000, have litigation pending in the state courts, one of which will soon be pending in the Supreme Court of the state. They confidently maintain that court will follow its decisions in these cases.

Kendrick v. A. Y. & Minnie M. & M. Co. 63 Colo.
214.

Paulding v. Mfg. Co. v. La Plata County, 63 Colo.
438.

CONCLUSION.

To grant plaintiff relief will work no injustice on other taxpayers of the county, since a tax levy to pay a judgment in this case and judgments to be obtained by the other banks must be paid *pro rata* by the plaintiff banks.

Sec. 14, p. 561, Session Laws of 1913 (*post*, page 66).

Rev. Stats. '08, Sec. 1183 (*post*, pp. 56-7).

Comp. Laws of 1921, Sec. 8664, p. 2218.

Plaintiff, therefore respectfully prays that the judgment of the trial court be reversed and that the cause be remanded for further proceedings to conform to the decision of this court.

HARRY N. HAYNES,
Attorney for Plaintiff in Error.

RALPH L. DOUGHERTY,
Of Counsel.

V.

APPENDIX.

PARTS OF COLORADO CONSTITUTION
REFERRED TO.

ARTICLE X, Section 2:

Tax provided for state expenses.—The general assembly shall provide by law for an annual tax sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year.

R. S. '08, p. 43

Comp. Laws '21, p. 59.

ARTICLE X, SECTION 3:

Uniform taxation—All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal;
* * * *

[Then follow certain exemptions unimportant here.]

R. S. '08, p. 44;

Comp. Laws '21, p. 59.

ARTICLE X, SECTION 7:

Municipal taxation.—The general assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may by law, vest in the corporate authorities thereof respectively, the power to assess and collect taxes for all purposes of such corporation.

R. S. '08, p. 44;

Comp. Laws '21, p. 59.

ARTICLE X, SECTION 10:

Corporations subject to tax.—All corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on the real and personal property

owned or used by them within the territorial limits of the authority levying the tax.

R. S. '08, p. 44;

Comp. Laws '21, p. 60.

ARTICLE X, SECTION 15:

Boards of equalization—Duties.—There shall be a state board of equalization, consisting of the governor, state auditor, state treasurer, secretary of state and attorney general, also, in each county of this state, a county board of equalization, consisting of the board of county commissioners of said county. The duty of the state board of equalization shall be to adjust and equalize the valuation of real and personal property among the several counties of the state. The duty of the county board of equalization shall be to adjust and equalize the valuation of real and personal property within their respective counties. Each board shall also perform such other duties as may be prescribed by law.

R. S. '08, p. 45.

PARTS OF REVISED STATUTES OF 1908
REFERRED TO.

SECTION 5520, p. 1301:

Property listed and assessed.—All taxable property shall be listed and valued each year, and shall be assessed at its full cash value; land to be listed and valued separate and apart from the personal property and improvements thereon.

Comp. Laws '21, Sec. 7178, p. 1836.

SECTION 5543, p. 1303:

All property subject to taxation—Property defined.—All property not expressly exempt by law shall be subject to taxation. The term "Property" as used herein, shall be held to include both tangible and intangible property.

Comp. Laws '21, Sec. 7196, p. 1839.

PART OF SECTION 5573, p. 1311:

Return of schedule.—Every * * * inhabitant shall make and deliver to the assessor between the first day of April and the twentieth day of May in each year, a full and correct schedule and description upon * * * blanks furnished * * *, of all the personal property of which such person was the owner on the first day of April of the current year * * *. In every such schedule and description the person making the same shall set down the full cash value of each item of the property therein mentioned, for the guidance of the assessor. But the assessor shall determine for himself the value of each item after an examination of the schedule.

Comp. Laws '21, Sec. 7225, p. 1847.

PART OF SECTION 5575, pp. 1311-12:

Owner describe real estate.—Every such inhabitant making any such schedule shall set down therein all real estate situate within the county by him owned or controlled on the first day of April, of the then current year, describing the same by some description sufficient to identify the same.

Comp. Laws '21, Sec. 7227, p. 1847.

PART OF SECTION 5584, p. 1314:

Debits may be deducted from credits.—In listing the amount of notes and credits held by him, the person making such schedule may deduct therefrom the amount of all his debts, * * * *

[Certain excepted liabilities, unimportant in this case, are then mentioned.]

Comp. Laws '21, Sec. 7236, p. 1850.

PART OF SECTION 5591, p. 1316:

Value of property, how determined.—In determining the true value of taxable property, except as otherwise provided in this act, the market value shall be the guide. * * * This section shall control the state board of equalization as well as the county assessors.
* * * *

Comp. Laws '21, Sec. 7243, pp. 1851-52.

SECTION 5608, p. 1319:

Personal property listed April 1.—Except as otherwise provided herein, personal property shall be listed and assessed in the county where it shall be on the first day of April in the then current year.

SECTION 5753, p. 1357:

Assessment of national bank stock.—Shares of the capital stock of banking associations organized or doing business within the state pursuant to the provisions of the acts of congress, held by any person or body corporate, shall be included in the valuation of the personal property of such person or body corporate, in the assessment of taxes in the county where such banking associations are located, and not elsewhere, whether the holder thereof resides there or not; and it shall be lawful for the state, county, town or municipal authorities to levy and assess upon such stock or each share thereof owned by such individual, body corporate, corporation or society, a sum equal to, but not greater according to the value thereof, than is valued and assessed upon other money capital in the hands of individual citizens in this state; Provided, That the tax so imposed under this act, upon the value of shares of such national banks shall not exceed the rate imposed upon the value of shares in any of the banks or banking associations organized under the authority of the State of Colorado or of the late territory of Colorado; Provided, also, that nothing herein shall exempt the real estate of such banking associations from either state, county or municipal taxes, but the same shall be taxed according to its value, as other real estate is taxed.

Comp. Laws '21, Sec. 7450, pp. 1906-7.

SECTION 5754, p. 1358:

Bank furnish list of stockholders.—Assessment of shares.—The president, cashier or principal accounting officer of any banking association, state, national, or otherwise, between the first day of April and the

first day of May of each year, shall list the shares of the association, giving the assessor the name of each person owning shares, and the amount owned by each; and such capital stock shall thereupon be assessed by the assessor, in all respects the same as similar property belonging to other corporations and individuals; and for the purpose of securing the collection of taxes assessed upon said shares, each banking association shall be liable to pay the same as the agent of each of its shareholders, under the provisions of the last preceding section, and the association shall retain so much of any dividend belonging to any shareholder as shall be necessary to pay any tax levied upon his shares; and if neither the said president, cashier or accounting officer shall comply with the provisions of this section, the association shall be liable to pay the tax upon all the said shares, and its lands may be sold, or its moneys, goods and personal effects distrained for the payment thereof, with like effect as if the tax were assessed against such association.

Comp. Laws '21, Sec. 7451, p. 1907.

SECTION 5756, p. 1358:

Annual statement of condition of bank—Value of stock.—It shall be the duty of the cashier, or some other officer of each national bank and each banking association and trust company, incorporated under the laws of this state, to, between the first day of April and the first day of May, in each year, make and deliver to the assessor, a sworn statement of the true condition of said association, as the same appears on the books thereof on April first, of that year. The said officer of said banking association shall, at the same time, make a sworn statement to the assessor, of the market value of the stock of said association, or, if it had no market value, then the actual book value thereof.

Comp. Laws '21, Sec. 7453, p. 1907.

PART OF SECTION 5630, pp. 1324-5:

State board of equalization assess property of railroads.—The state board of equalization shall meet * * * on the first Monday in April of each year and * * * from day to day thereafter until the business * * * hereinafter provided shall be accomplished. It shall be the duty of said board to assess at the full cash value of all the property, tangible and intangible, in this state, used or controlled by railway companies, telegraph, telephone, palace car, sleeping car, fast freight and express companies. * * *

The said board shall certify to the several county assessors, and also to the several county clerks of this state, the amount and value of the property assessed by the said board, and the amount assessed as being within the county of such assessor and county clerk. They shall make such assessment and certify the same on or before the fifteenth day of June of each year.

Comp. Laws '21, pp. 1862-63, Sec. 7284.

[Note:—This power of initial assessment by said board was taken away by statutes of 1911 and 1913, and was vested in Colorado Tax Commission—see page 63, *post*.]

PART OF SECTION 5632, p. 1325:

Board summon and examine county assessor as to his assessment.—The state board of equalization shall have power to require any assessor to appear before it at any of its meetings and to examine such assessor, under oath, concerning the assessment in his county for the purpose of ascertaining whether such assessor has complied with the law in assessing property in his county. * * *

[N. B.—By the Act of 1911, (*post*, page 60) the Colorado Tax Commission is given said power in lieu of the state board of equalization.]

Comp. Laws '21, Sec. 7286, p. 1863.

PART OF SECTION 5636, p. 1326:

Procedure when property is omitted or assessed too low.—If in the opinion of the state board of equalization upon satisfactory information submitted, any county assessor has omitted taxable property in his county from the abstract of assessment, or has assessed the property of his county palpably and manifestly below its true value, or has failed to verify his return as herein required, and if said state board of equalization is likewise of the opinion that such delinquency operates as a fraud upon the state revenues, and that such revenues will be seriously impaired thereby, then and in such case the state board of equalization shall, upon reasonable notice to the assessor and after summary hearing, shall require the delinquent assessor to forthwith make such corrections and additions to the said assessment as will make the same in accordance with the statutes unless the board also further finds that said erroneous assessment was wilfully made, in which case proceedings shall be had as hereinafter provided. * * * *

[The Colorado Tax Commission, by Act of 1911, pp. 625-6, sec. 40, *post*, p. 63, and by p. 521, sec. 1, of the Act of 1913, *post*, p. 63, in lieu of the state board of equalization is authorized to exercise the powers provided for therein.]

Comp. Laws '21, Sec. 7289, pp. 1864-65.

PART OF SECTION 5639, p. 1327:

Aggrieved person apply to assessor—Notice of change in valuation.—If, in the opinion of any taxpayer, his property has been twice assessed, or if the property exempt from taxation has been assessed, or if personal property has been assessed of which said person was not possessed at the time of the assessment, or if any property has been assessed too high, or if any property has been otherwise illegally assessed, such person having such grievance may appear before the assessor and make known to the assessor the facts in the premises; and if in any particular the assessment complained of is erroneous

under the statutes, the assessor shall correct the same. The assessor shall, prior to the first Tuesday in August of each year, mail to each person, association or corporation, whose property has been assessed at a valuation other than that given in the schedule filed by such person, association or corporation, a statement of any such change in valuation, and shall give notice, by publication in at least one issue of a paper published in the county seat, that on a day to be therein named he will sit to hear any and all objections to the assessment roll. * * * The assessor shall continue such hearing from day to day, and time to time, until all grievances shall be heard; but all hearings shall be concluded before the day of the first meeting of the county board of equalization.

Comp. Laws '21, Sec. 7291, p. 1865.

SECTION 5640, pp. 1327-8:

Objections when valuation exceeds \$7,500—Hearing—Appeal.—In all cases where the amount of the total assessed valuation assessed against such taxpayer exceeds the sum of \$7,500, every objection and statement of grievance pursuant to the following section shall be in writing, stating the particular grounds of such objection, or the particular facts wherein such grievance consists; and if such objection be overruled by the assessor, in whole or in part, he shall state briefly in writing the grounds of his refusal, and the taxpayer complaining may appeal from his decision to the district or county court of the county wherein the property is assessed on or before the first Monday in January following said assessment. * * * But before the appeal shall be allowed the petitioner shall pay to the county treasurer the amount of the tax levy pursuant to said assessment, and in case the appellant shall succeed in the county or district court, in whole or in part, the treasurer shall refund such tax according to the judgment of such court. And in all cases where any tax so collected shall be refunded, the tax-

payer shall be entitled to receive interest on the amount refunded at ten per cent. per annum from the time of payment thereof; Provided, however, That the said court shall not review or give relief against an assessment unless it shall appear manifestly excessive, fraudulent or oppressive.

Both the assessor and the said county or district court, in considering such statement of grievance by any such taxpayer, shall take into consideration the value as fixed by the assessor upon other similar assessable property similarly situated.

Comp. Laws '21, Sec. 7292, pp. 1865-66.

SECTION 5761, p. 1359:

County board of equalization—Meetings—Powers and duties.—The county commissioners of each county shall constitute a board of equalization for the adjustment and equalization of the assessment among the several taxpayers of their respective counties. Said board shall hold two regular meetings in each year, at the office of the county clerk, at the county seat, as follows, viz.: Commencing on the first Tuesday in September, and continuing not less than three nor more than ten consecutive days, and on the third Tuesday of September, and continuing not less than two nor more than ten consecutive days. The board shall notify the assessor to supply any omissions in the assessment roll, which may come to their notice.

In case any material changes are made or directed by said board in the assessment of any person or persons, at said first meeting, the county clerk shall, as soon as may be after the close of said meeting, mail to each of such persons, prepaying the postage thereon, a notice of such change. Such notice by mail shall be deemed personal and sufficient, if properly addressed to such person or persons at the post-office nearest their respective places of residence.

The board shall, at its second meeting, sit to hear complaints, only from those dissatisfied with said

changes and to adjust the assessment so as to equalize the same among the several taxpayers of the county; Provided, That in case the time specified herein for either of said meetings shall prove too short for the full consideration of all cases for adjustment, the board of county commissioners may, by order of record, extend the time of either of such meetings to such day, as, in their judgment, the business of such meetings, or either of them, may require, such extension not to exceed ten days in any case.

Comp. Laws '21, Sec. 7458, p. 1908.

[Note:—Section 5628, Rev. Stats. of '08 regarding duty of Assessor to prepare and transmit to state official Abstract of Assessment roll by Sept. 1, was amended by Session Laws of 1913, pp. 535-6, *post*, pp. 65-6.]

SECTION 5764, p. 1360:

Meeting of state board of equalization to equalize assessment.—The state board of equalization shall sit on the first Monday of October in each year, at the executive office, for the purpose of examining, adjusting and equalizing the assessments in the several counties of the state.

Comp. Laws '21, Sec. 7463, p. 1910.

PART OF SECTION 5767, p. 1360:

Equalization completed.—On or before the third Monday of October in each year the board shall complete the equalization and the state auditor shall transmit to the clerk of the county a statement of the changes, if any, which have been made in the assessments, and the rate of tax which is to be levied and collected within his county, which shall not exceed the limit permitted by the constitution; and when the board fixes no different rate, or if for any reason the board fails to sit, or the county clerk should fail to receive the statement of the rate of tax ordered by them, that rate shall be the same as levied for the preceding year; and the assessor of each county in making up the tax list, shall compute and carry out in the proper column a state tax at the rate aforesaid.

Comp. Laws '21, Sec. 7465, pp. 1910-11.

SECTION 5664, p. 1335:

Correction of assessment.—Immediately upon the receipt by the assessor of each county of the statement of changes in the assessment of his county, made by the state board of equalization, he shall immediately make such correction of the assessment and assessment roll as may be necessary to carry out the directions of the state board of equalization.

Comp. Laws '21, Sec. 7315, p. 1873.

PART OF SECTION 1331, p. 461:

Treasurer assess property omitted by assessor.—It shall be the duty of said county treasurer to assess, at a fair value, the property of any person liable to pay taxes, whom the county assessor has failed to assess, and to place the same on the tax roll, and to collect taxes on the same in the manner provided by law; * * *

[Next follows proviso unimportant here.]

Comp. Laws '21, Sec. 8806, p. 2247.

SECTION 5528, p. 1301:

Taxes shall be levied.—That for the support of the government of the state, and the payment of the public debt and the advancement of public interest, taxes shall be levied as hereinafter provided.

Comp. Laws '21, Sec. 7177, p. 1836.

SECTION 5671, p. 1337:

Levy for state purposes.—There shall be levied upon all the taxable property in this state in each year, for all state purposes, four mills on the dollar, when no lower rate is prescribed by the state board of equalization.

Comp. Laws '21, Sec. 7367, p. 1884.

SECTION 109, p. 203:

Agricultural college tax—One-fifth mill.—That to provide a fund for the support and maintenance of the state agricultural college located at Fort Collins, there shall be assessed and levied annually upon all taxable property in this state the following tax, to-

wit: One-fifth of one mill on each dollar of the yearly assessed value of such property, which shall be known as the "Agricultural College" tax, and shall be levied and collected at the same time and in the same manner provided by law for the assessment and collection of state taxes.

Comp. Laws '21, Sec. 8091, p. 2083.

SECTION 4150, p. 1040:

Insane Asylum Tax.—There shall be levied and assessed upon all taxable property in the state, real and personal, for the creation and support of such [Insane] asylum as herein provided, a tax of one-fifth of a mill on each and every dollar, to be known as the insane tax; such revenue to be assessed and collected in like manner with other revenues of the state.

Comp. Laws '21, Sec. 575, p. 344.

SECTION 4329, p. 1083:

Tax for support of deaf and blind institution.—There shall be levied and assessed upon all taxable property, both real and personal, within this state, in each year, the following tax for the support of said institution for the education of the mute and blind, one-fifth of one mill on each and every dollar, to be known as the blind and mute tax; said tax to be assessed and collected in the same manner and at the same time as is now or may be prescribed by law for the assessment and collection of state revenues. * * *

[Next follows proviso, unimportant here.]

Comp. Laws '21, Sec. 8205, p. 2102.

SECTION 6025, p. 1417:

State school of mines tax.—That to provide a fund for the support and maintenance of the state school of mines, located at Golden, there shall be assessed and levied annually upon all taxable property in this state the following tax, to-wit: One-fifth of one mill on each dollar of the yearly assessed value

of such property, which shall be known as the "School of Mines Tax", and shall be levied and collected at the same time and in the same manner provided by law for the assessment and collection of state taxes.

Comp. Laws '21, Sec. 8043, p. 2075.

SECTION 6127, p. 1438:

State normal school tax.—There is hereby appropriated annually for the support and maintenance of the state normal school of Colorado and out of, and as a part of, the annual levy, assessment and collection of taxes for general state purposes, the proceeds and amounts derived and collected pro rata upon one-fifth of one mill on each dollar of the assessed annual valuation of the taxable property of the state; and it shall be the duty of the state board of equalization, and other officers whose duty it is to make such levy and assessment for general state purposes, to extend and assess said appropriation of one-fifth of one mill, as above provided, in a separate column of account upon all assessment rolls and books used in the levy, assessment and collection of taxes for state purposes, ~~to extend and assess said appropriation of one-fifth of one mill, as above provided, in a separate column of account upon all assessment rolls and books used in the levy, assessment and collection of taxes for state purposes.~~

Comp. Laws '21, Sec. 8156, p. 2093.

SECTION 6952, p. 1618:

Tax levy for support of university.—There shall be assessed upon all taxable property of the state in each year, beginning with the year A. D. 1903, for the support of the university of Colorado, two-fifths of one mill on each and every dollar of the assessed value of said taxable property, to be assessed and collected in the same manner and at the same time as is now, or may be prescribed by law, for the assessment and collection of state taxes. * * *

Comp. Laws '21, Sec. 8013, p. 2071.

SECTION 5669, p. 1337:

Taxes for state institutions entered in one column.—All taxes levied for state institutions in each year shall be combined under one head and entered by the county assessor of each county of the state upon the tax list, under the head of state institutions, in one column.

Comp. Laws '21, Sec. 7320, p. 1874.

SECTION 5760, pp. 1358-9:

Commissioners order tax levy.—On the first Monday in November in each year, the board of county commissioners shall by an order to be entered of record among their proceedings, levy the requisite tax for the year, for school and other county purposes as required by law, and the same may be levied at any time prior to the first Monday in November, if the statement of the rate of tax to be levied for state purposes has been received from the auditor. If, for any cause, the commissioners shall not be able to levy such taxes on or before the first Monday of November, in any year, they may make such levy at any time.

Comp. Laws '21, Sec. 7457, p. 1908.

SECTION 6652, p. 1549:

Power to levy taxes.—The city council or board of trustees of any city or town shall have power and authority to levy taxes, the same kinds and classes, upon taxable property, real, personal and mixed, within the limits of the city or town, as are subject to taxation for state or county purposes, in accordance with the laws of this state.

Comp. Laws '21, Sec. 9149, p. 2338.

SECTION 6653, p. 1549:

Assessor designate property in return.—It shall be the duty of the county assessor each year, in making his return, to designate the property situate within the limits of any city or town in such county.

Comp. Laws '21, Sec. 9150, p. 2338.

SECTION 6655, p. 1549:

County clerk extend city and town taxes.—Include in warrant.—It shall be the duty of the county clerk and recorder, as soon as the assessment roll is ready in each year, for the extension of the taxes, to extend the same upon the tax list of the current year, in a separate column, properly headed, in the same manner as other taxes are extended, carrying said city or town tax into the general total of all taxes for the year, and shall include said city and town taxes in his general warrant to the county treasurer for collection.

Comp. Laws '21, Sec. 9152, p. 2338.

[Note:—In *City of Highlands v. Johnson*, 24 Colo., p. 371, 377, referring to a section of which this was a reenactment, the court in effect says that the effect of certain other legislation is to read into this section "the word 'assessor' instead of 'county clerk' ".]

PART OF SECTION 6657, pp. 1549-50:

County treasurer may collect city taxes.—It shall be the duty of the treasurer of said county, and he is hereby authorized and empowered to collect the said city or town taxes in the same manner and at the same time as other taxes upon the same tax list are collected. * * *

Comp. Laws '21, Sec. 9154, p. 2339.

SECTION 1329, p. 460:

Treasurer collector of taxes.—The county treasurer of each county shall be, by virtue of his office, collector of taxes therein, and shall perform such duties in that regard as are prescribed by law.

Comp. Laws '21, Sec. 8804, p. 2247.

[Sec. 5666 covering duty of assessor to deliver warrant and tax list to county treasurer was amended by Session Laws of 1913, p. 532, sec. 9, *post*, page 65.]

SECTION 5667, p. 1336:

Informality not invalidate—Receipt for warrant.
—No informality in complying with the above requirements shall render any proceeding for the collection of taxes illegal. The assessor shall take the receipt of the treasurer for the warrant, and such warrant shall be full and sufficient authority for the treasurer to collect all taxes contained therein.

Comp. Laws '21, Sec. 7318, p. 1874.

SECTION 5672, p. 1337:

Collection of taxes—Pro rate to funds.—The treasurer, on receiving the tax list and warrant, shall proceed to collect the tax therein levied, and the list and warrant shall be his authority and justification against any illegality in the proceedings prior to receiving the list. He shall, upon the last day of each month, pro-rate the total amount of the taxes collected during the month to the several funds.

Comp. Laws '21, Sec. 7368, p. 1884.

SECTION 5537, p. 1302:

When taxes payable.—All taxes shall be due and payable, one-half on or before the last day of February, and the remainder on or before the last day of July of the year following the one in which they were assessed. The treasurer shall receive the tax assessed against any person who may offer to pay the same, at any time after the tax warrant shall come into his hands.

Comp. Laws '21, Sec. 7190, p. 1838.

SECTION 5538, p. 1302:

Penalty for non-payment of first installment.—In case the first installment of one-half of any tax is not paid prior to March first in any year, then there shall be assessed against such installment a penalty of one per cent. for each month or fractional part thereof from March first until paid, provided it is paid prior to August first, as provided by law.

Comp. Laws '21, Sec. 7191, p. 1838.

SECTION 5690, p. 1341:

When taxes delinquent—Interest.—On the first day of August in each year the unpaid taxes of the preceding year become delinquent and shall thereafter draw interest at the rate of fifteen per cent. per annum, but the treasurer shall continue to receive payments of the same, with interest, until the day of sale for taxes; Provided, That nothing in this section shall be construed to prevent the collection of the penalty provided for in section 11 of this act.

Comp. Laws '21, Sec. 7386, p. 1888.

SECTION 5539, p. 1302:

Disposition of penalties and interest.—All penalties and interest accruing upon any tax (not including the cost of advertising) shall be distributed, when collected, between the state, the county and the various municipalities and districts, in or for which the tax is levied, in the same proportion as the tax.

Comp. Laws '21, Sec. 7192, p. 1838.

PART OF SECTION 5677, p. 1338:

Tax on personal property a lien.—All taxes levied or assessed upon personal property of any kind whatsoever shall be and remain a perpetual lien upon the property so levied upon, until the whole amount of such tax is paid. * * *

Comp. Laws '21, Sec. 7375, p. 1885.

PART OF SECTION 5678, pp. 1338-9:

Sale of personal property.—When the treasurer distrains goods he may keep them at the expense of the owner, and shall give notice of the time of their sale within five days after the day of taking, in the manner constables are required to give notice of the sale of personal property on execution. * * *

Comp. Laws '21, Sec. 7376, p. 1886.

SECTION 5748, p. 1356:

Auditor allow for double or erroneous assessments.—The auditor of state shall allow to each county treasurer who shall be allowed to take credit for the amount of state tax that may have been from time to time refunded to the taxpayer, as double or erroneous assessments, or refunded to the purchaser of real estate erroneously sold.

Comp. Laws '21, Sec. 7445, p. 1905.

SECTION 5750, p. 1357:

County responsible for state taxes—Refund—Each county is responsible to the state for the full amount of tax levied for state purposes, excepting such amounts as are certified to be unavailable, double or erroneous assessments, as provided in this act, and in all cases where any person shall pay any tax, interest or cost, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, or clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer.

Comp. Laws '21, Sec. 7447, p. 1906.

[Note:—The construction of this section was somewhat affected by the enactment of Section 5, page 528, Session Laws of 1913, *post*, pages 64-65.]

Union Pacific R. Co. v. Weld County,
247 U. S. 282.

Kendrick v. Mining & Milling Co., 63
Colo. 214.

First National Bank v. Patterson, 65
Colo. 166, 174-6.

PART OF SECTION 1183, p. 436:

Judgment against a county, how paid—Tax levy.
—When a judgment shall be given and rendered against a county of this state in the name of its board of county commissioners, or against any county offi-

cer, in an action prosecuted by or against him in his official capacity, or name of office, when the judgment is for money, and is a lawful county charge, no execution shall issue thereon, but the same may be paid by the levy of a tax upon the taxable property of said county, and when the tax shall be collected by the county treasurer, it shall be paid over, as fast as collected to him, to the judgment creditor, or his or her assigns, upon the execution and delivery of proper vouchers therefor; but nothing contained in this section shall operate to prevent the county commissioners from paying all or any part of any such judgment by a warrant, drawn by them upon the ordinary county fund in the county treasury; Provided, that the power hereby conferred to pay such judgment by a special levy of such tax, shall be held to be in addition to the taxing power given and granted to such board, to levy taxes for other county purposes.

[Remainder of this section is unimportant for purposes of this case.]

Comp. Laws '21, Sec. 8664, p. 2218.

SECTION 1220, p. 444.

Claims presented to board before action commenced.—All claims and demands held by any person against a county shall be presented for audit and allowance to the board of county commissioners of the proper county, in due form of law, before an action in any court shall be maintainable thereon, and all claims, when allowed, shall be paid by a county warrant, or order, drawn by said board on the county treasury, upon the proper fund in the said treasury, for the amount of such claim.

Comp. Laws '21, Sec. 8697, p. 2226.

SESSION LAWS OF 1911.

PART OF SECTION 1, p. 585:

Special school tax—Levy—Assessment.—On or before the day designated by law for the commissioners of each county to levy the requisite taxes for the then ensuing year, the school board in each district shall certify to the board of county commissioners a statement showing the aggregate amount, which, in the judgment of said school board, it is necessary to raise from the taxable property of said district, to create a special fund. * * * It shall thereupon be the duty of the county commissioners to levy, at the same time that other taxes are levied, such rate, within the limits allowed by law, as will produce the aggregate amount so certified. The amount of such special tax, which shall be assessed to each taxpayer of such district, shall be placed in a separate column of the tax book, which shall be headed “special school tax”; * * *

Comp. Laws '21, Sec. 8286, pp. 2117-18.

SECTION 1, p. 612:

Colorado tax commission.—There is hereby created a commission to be designated and known as the Colorado tax commission. This commission shall exercise the powers and perform the duties imposed upon it by the provisions of this act subject to the direction and approval of the state board of equalization.

Comp. Laws '21, Sec. 7322, p. 1874-5.

PART OF SECTION 11, p. 615:

Appointment and compensation of employees.—The commission is authorized to employ a secretary, examiners, experts, clerks, accountants, stenographers and other assistants. * * *

[Note:—The remainder of the section covers compensation and expenses.]

Comp. Laws '21, Sec. 7332, p. 1876.

PART OF SECTION 13, pp. 615-18:

Duties, powers and authority.—That it shall be the duty of the commission, and that it shall have and exercise power and authority:

First: To have general supervision over the administration of and to enforce all laws for the assessment, levying and collection of taxes, and to this end shall exercise supervision over the county assessors, boards of county commissioners, county boards of equalization, and all other officers and boards of assessment, levy and collection, to the end that all assessment of property, real, personal, and mixed, be made relatively just and uniform and at its true and full cash value; to require all county assessors, county commissioners, county boards of equalization, under penalty of forfeiture and removal from office as such assessors or boards, to assess all property of every kind or character at its actual and full cash value.

Second: * * * It shall see that all laws concerning the valuation and assessment of all classes of property, and the collection of taxes thereon are faithfully obeyed. * * *

Fifth: To investigate the work and methods of county assessors, boards of county commissioners, county boards of equalization and county treasurers in the assessment, equalization and collection of taxes on all kinds of property by visiting the counties of the state, and for the purpose one or more members of the commission shall visit at least one-half of the counties of the state annually, and shall visit every county in the state at least once in two years.

Sixth: Whenever in the judgment of the tax commission, property in any county or municipal subdivision thereof has not been assessed at its true and full cash value the commission may make a reappraisal of the property therein, to the end that all classes of property in such taxing district shall be assessed in compliance with the law. * * *

Seventh: The commission may raise or lower the assessed value of any real or personal property, first giving notice to the owner or owners thereof, fixing a time and place for hearing any person or persons interested to the end that the assessment laws of the state may be equitably administered, and said hearing shall be held within the county in which said property is situated.

Eighth: The state tax commission shall have power to require any assessor to appear before it at any of its meetings and to examine such assessor, under oath, concerning the assessment of his county for the purpose of ascertaining whether such assessor has complied with the law in assessing property in his county. * * *

Comp. Laws '21, Sec. 7334, pp. 1876-8.

SECTION 14, p. 618:

Remission of taxes.—The Commission may direct the county commissioners to remit taxes and penalties thereon, found by it to be illegally assessed and such penalties as have accrued, or may accrue, in consequence of the neglect or error of an officer required to perform a duty relating to the assessment of property for taxation, or the levy or collection of taxes. It may correct an error in an assessment of property for taxation or in the tax rolls in a county.

No such taxes or penalties in excess of one hundred dollars shall in any case be remitted until after at least ten days' notice of the application to have the same remitted shall have been served upon the county attorney and the county assessor of the county where such taxes were levied, and proof of such service has been filed with the Commission.

Comp. Laws '21, Sec. 7335, p. 1878.

SECTION 15, p. 618:

Complaints.—The Commission may receive complaints and carefully examine into all cases where it is alleged that property subject to taxation has not

been assessed or has been fraudulently or for any reason improperly or unfairly assessed, or the law in any manner evaded or violated, and may cause to be instituted such proceedings as will remedy improper or negligent administration of the taxation laws of the state.

Comp. Laws '21, Sec. 7336, p. 1878.

SECTION 30, p. 622:

Abstract of county assessor.—What abstract shall contain.—Each county assessor, on or before the first Monday of September, 1911, and every year thereafter, shall make and transmit to the commission an abstract of the real and personal property of his county in which he shall set forth the value thereof with such additions as have been made thereto.

Comp. Laws '21, Sec. 7351, p. 1881.

SECTION 31, p. 623:

Duty of the commission.—The commission shall, on or before the first day of October following, determine whether the real and personal property of the several counties in the state shall have been assessed at its true and full cash value, and if, in the opinion of the said commission the real or personal property within any county in the state as reported by said county assessor to the said commission is not on the assessment roll at its true and full cash value, the said commission shall determine the increase or decrease in the valuation in such county by such rate per cent., or such amount as will place said property on the assessment roll at its true and full cash value.

Comp. Laws '21, Sec. 7352, p. 1881.

SECTION 32, p. 623:

Statement to the state board of equalization.—When the commission has determined the true value of the real and personal property in the several counties, the commission shall transmit to the state board of equalization a statement of the amount to be added

to or deducted from the valuation of the real and personal property of each county, specifying the amount to be added to or to be deducted from the valuation of the real or personal property.

Comp. Laws '21, Sec. 7353, p. 1881.

SECTION 33, p. 623:

Duty of state board of equalization.—It shall be the duty of the state board of equalization to examine the abstracts of assessment as submitted by the state tax commission and the state board of equalization shall forthwith examine the abstract of assessment of each county as submitted by the state tax commission and make a record of its action on the abstract of each county and certify the same to the county assessor, and the county assessor shall forthwith add to or deduct from each tract or lot, and its improvements, of real property and all personal property in his county the required per cent., or amount on the valuation thereof as it stands after it has been equalized by the state board of equalization, adding or deducting in each case any sum less than five dollars so that the value of any separate tract or lot and its improvements shall be ten dollars or some multiple thereof.

Comp. Laws '21, Sec. 7354, p. 1881.

SECTION 34, p. 624:

Notices and orders.—In case of all original assessments made by the commission every order or notice provided for in this act shall be served upon every person or corporation to be affected thereby either by personal delivery of certified copy thereof or by mailing a certified copy thereof by registered mail to the persons to be affected thereby, or in case of a corporation to the company, officer or agent thereof upon whom summons may be served. Within the time specified in the order by the commission every person or corporation upon whom it is served if so required in the order, shall notify the commis-

sion in like manner whether the terms of the order are accepted and will be obeyed.

Comp. Laws '21, Sec. 7355, p. 1881.

SECTION 40, pp. 625-6:

Powers of equalization board conferred on tax commission in part.—All powers of original assessment of public utility corporation with other statutory powers, duties and privileges now exercised by the state board of equalization are hereby conferred upon the Colorado tax commission, provided that the powers and duties of original assessment so transferred by this act shall continue to be exercised by the state board of equalization until June 15, 1911, after which they shall be exercised by the commission.

[Note:—This section was amended by Session Laws of 1913, p. 525, section 1,—see *post*, this page.]

COLORADO SESSION LAWS OF 1913.

SECTION 1, p. 525:

That Section 40 of Chapter 216 of the Session Laws of 1911 [Section 40, pp. 625-6 last *supra*], be and the same is hereby amended to read as follows:

All statutory powers, duties and privileges heretofore exercised by the state board of equalization are hereby conferred upon the Colorado Tax Commission and in addition thereto it shall be the duty of the Colorado Tax Commission to exercise all powers of original assessment of all public utility corporations as herein defined.

Comp. Laws '21, Sec. 7361, p. 1882.

SECTION 3, p. 527:

Certification of valuation to school districts, towns and cities—Levies certified.—On or before October 25th of each year the county assessor shall certify to the clerk of each city and town within the county, the total valuation of assessable property within each city and town directing each city and

town through its clerk to officially certify its levy for town or city purposes upon said valuation to the county commissioners prior to November 1st. On or before October 25th of each year the county assessor shall certify to the county superintendent of schools the assessable valuation of all property with each school district in the county. The county superintendent of schools is required to immediately notify the clerks of the several school boards of the several school districts within the county, and upon receipt of said notice each school board shall make their levy and certify the same to the county superintendent of schools on or before November 1st of the current year. Upon receipt of said certification the county superintendent of schools shall immediately certify the levy of the several school districts of the county to the county commissioners.

Comp. Laws '21, Sec. 7224, p. 1846.

SECTION 5, p. 528:

Abatement, rebate and refund of taxes.—No abatement, rebate or refund of taxes shall be allowed by the county commissioners, unless a hearing shall be had thereon and a notice of such hearing and an opportunity to be present being first given to the assessor, and in case any abatement, rebate or refund of taxes shall be recommended by said county commissioners, they shall certify to the Colorado tax commission their findings, giving the amount of such abatement, rebate or refund, and their reasons therefor, and such abatement, rebate or refund shall become effective upon the endorsement thereon of the approval of the Colorado tax commission and in case the said Colorado tax commission shall disapprove the recommendations of the county commissioners, they shall endorse their disapproval thereon and return it to the county commissioners with a statement of their reasons therefor and no abatement, rebate or refund of taxes shall be allowed by the said board of

county commissioners if the application is disapproved by the said Colorado tax commission.

Comp. Laws '21, Sec. 7460, pp. 1908-9.

PART OF SECTION 9, p. 532:

Assessor deliver tax list and warrant.—As soon as practicable after the taxes are levied, and not later than the first day of January, annually, every county assessor shall deliver to the county treasurer the tax list and warrant under his hand and official seal, setting forth the assessment roll, with the taxes extended, * * * commanding the treasurer to collect the said taxes. * * * At the end of the tax list and warrant he shall prorate the total tax levied to the several funds. Said tax list and warrant shall be in form approved by the Colorado tax commission.

Comp. Laws '21, Sec. 7317, pp. 1873-4.

PART OF SECTION 3, pp. 535-536:

Amending Sec. 5628, Rev. Stats. '08, p. 1323.

Abstract of assessment sent to tax commission.—The assessor of each county of the state, upon the completion of the assessment roll in each year, and prior to the endorsement of the tax list and warrant thereon, and on or before September 1 of each year, shall make in duplicate a true abstract of such assessment roll one of which abstracts of the assessment shall be written in the assessment roll and be a part thereof. Such assessor shall in person subscribe his name to the following statement :

I, _____ the assessor of _____ county, Colorado, do solemnly swear upon oath, that in the assessment roll of _____ county, I have assessed all the taxable property situate therein for the current year and at the true and full cash value thereof and that the foregoing abstract of assessment is a true compilation of each and every schedule

The assessor shall swear as to the truth of the facts set forth in said statement and immediately transmit by registered mail to the Colorado Tax Commission one copy of such statement and abstract of assessment

Comp. Laws '21, Sec. 7268, p. 1858.

PART OF SEC. 11, p. 560:

Limiting levy of taxes.—All statutory rates making provision for fixing the limit of indebtedness are hereby decreased in the same proportion as the assessed valuation of the taxing districts to which they apply is increased.

Except as herein otherwise provided, all statutory rates making provisions for the revenues of the state and for state institutions, schools, towns, cities and for all other purposes, are hereby so reduced as to prohibit the levying of a greater amount of revenue on the assessed value of the year 1913 than was levied for the year 1912, plus fifteen per cent. For each year after 1913 the tax rates shall be so limited as not to levy a greater amount of revenue than was levied the preceding year, plus five per cent.

[The remainder is substantially a repetition of the subparagraph last printed supra.]

SECTION 14, p. 561:

Limitation does not apply to a valid debt or judgment.—This act shall in no way limit the amount of any levy necessary to be made for the purpose of paying any bonded debt or outstanding warrants heretofore lawfully issued, judgment or the interest thereon against the state, or any county, city, town or school district or for special assessments for local improvements.

PART OF SECTION 1, p. 563:

Demand not necessary—Distrain and sale of property—Tax receipt.—No personal demand of taxes shall be necessary, but it is the duty of every person subject to taxation to attend at the office of the treasurer and pay the first half of the taxes levied against his taxable property on or before the last day of February, and the remaining one-half part thereof on or before the last day of July of the year following the one in which they were assessed; and if such person shall neglect or fail to pay such tax until after the first day of August, following the levy of the same, the treasurer may make the same, together with all penalties and costs, by distrain and sale of any of his personal property, whether it be the property taxed or other property. * * * The treasurer shall issue for each payment of taxes, a receipt. * * * On the reverse side of the tax receipt shall be printed the apportionment of the levy or levies.

Comp. Laws '21, Sec. 7371, pp. 1884-5.

SECTION 21, CODE OF CIVIL PROCEDURE:

Suit by debtor.—An action may be brought by one person against another for the purpose of determining a claim, which the latter makes against the former for money or property, upon an alleged liability, and also against two or more persons for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as security.

Rev. Stats. of 1908, p. 77.

Comp. Laws '21, p. 105.

Respectfully submitted,

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RALPH L. DOUGHERTY,
Of Counsel.



DEC 12 1923

WM. R. STANSBURY
CLERK

(29,817)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1922

No. **180**

THE FIRST NATIONAL BANK OF GREELEY,
Plaintiff in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF WELD,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO.

BRIEF OF DEFENDANT IN ERROR.

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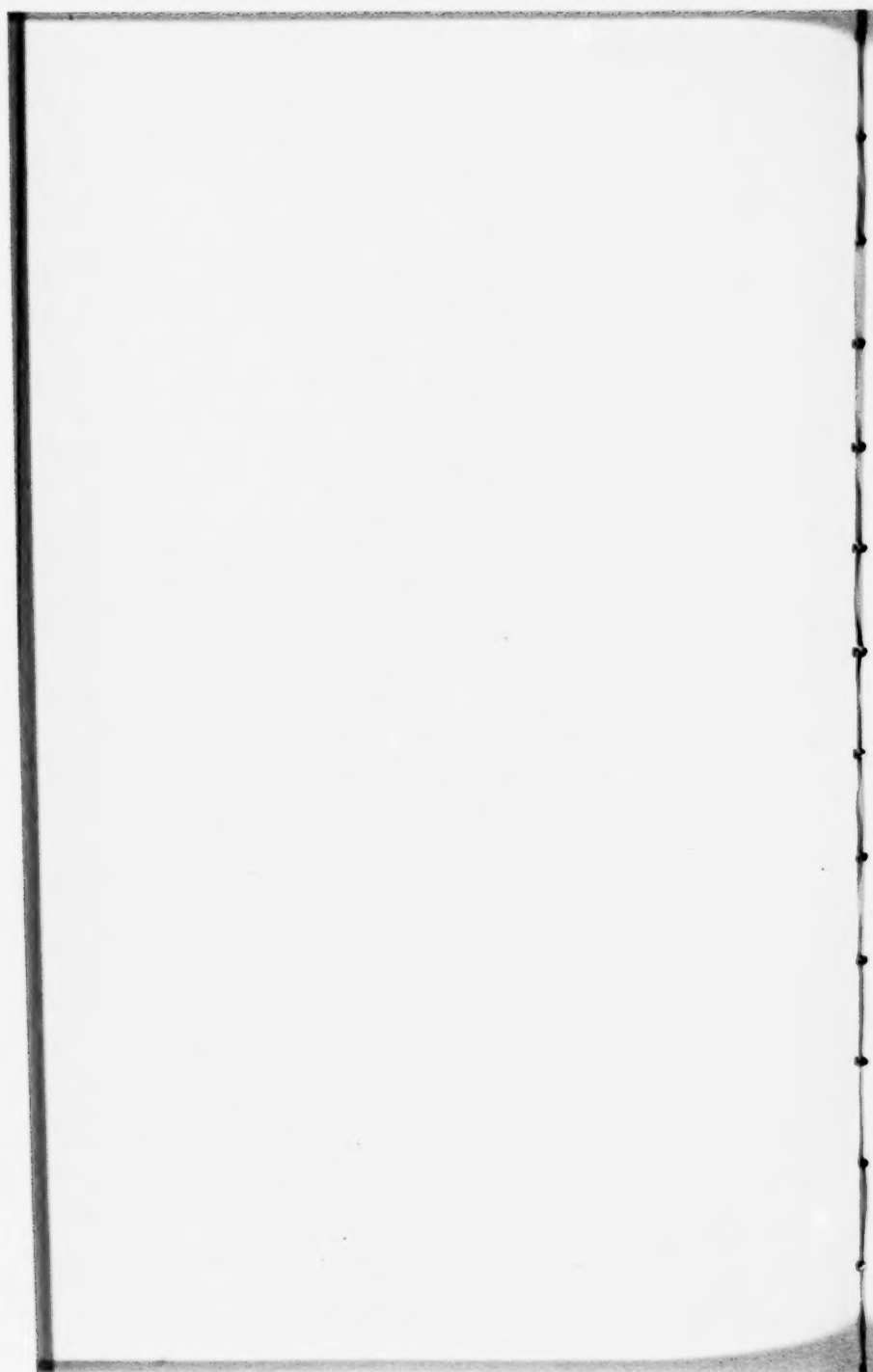
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(29,317)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

No. 767

THE FIRST NATIONAL BANK OF GREELEY,
Plaintiff in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF WELD,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This writ of error is brought to review the judgment of the District Court of the District of Colorado, sustaining the general demurrer of defendant below to the original and amended complaints. Plaintiff in error will be referred to herein as plaintiff.

The original complaint was filed March 8, 1921, and sought, in the first cause of action, to recover taxes levied for the year 1913 which became due March 1, 1914, and became delinquent August 1, 1914; and, in the second cause of action, to recover taxes levied for the year 1914, which likewise became due March 1, and delinquent August 1, of the following year. The portions of these taxes that are alleged to be excessive were all paid in 1915, but this action was not brought until very nearly six years later.

The amended complaint is substantially the same as the original. The complaint is that the property of plaintiff was assessed too high.

The increases in the valuation of plaintiff's property as fixed by the county assessor for the two respective years were brought about by horizontal raises of the valuations of all property in the county, except that of public utilities which is initially assessed by the Colorado Tax Commission. These horizontal raises were recommended, each of these years, by the Colorado Tax Commission, pursuant to the authority vested in that body by the statutes of the State (Session Laws, 1911, p. 623, Sec. 31; Compiled Laws, 1921, Sec. 7352—printed in brief of plaintiff, p. 61), and which recommendations were thereafter adopted by the State Board of Equalization (Printed Record, pp. 19 and 25).

Plaintiff now makes no complaint as to the valuation of its property as fixed by the county assessor, but contends that the action of the superior taxing authorities in bringing about these horizontal raises resulted in an excessive and unequal valuation of its property for each of the two years.

No claim is made, in either the original or the amended complaint, that there was any systematic, intentional or arbitrary discrimination against plaintiff in the fixing of the amount of the assessments of its property.

Plaintiff does claim, in the first cause of action only, in its amended complaint, that it was discriminated against in that the tax commission denied its petition for rebate of part of the taxes levied in 1913, but this petition was pre-

sented in April, 1914, long after the taxes were levied (Printed Record, p. 21).

It is not alleged either in the original or in the amended complaint that the plaintiff protested to the county assessor or appealed or complained to any of the superior assessing agencies established by law, prior to the laying of the tax.

The action of the State Board of Equalization in ordering the horizontal raises in fifty-eight out of the sixty-three counties in the State as to the 1913 valuations, has been litigated and gone to courts of last resort in several reported cases, all of which have upheld such action as legal. It has been litigated in this court in *Bi-Metallic Investment Company v. State Board of Equalization*, 239 U. S. 441-446. That case was brought to this Court from the Supreme Court of the State of Colorado and the decision of the state court was affirmed. The opinion in the *Bi-Metallic* case also refers to *Colorado Tax Commission v. Pitcher*, 56 Colo. 343, which had upheld this horizontal raise as applied to the City and County of Denver.

BRIEF OF THE ARGUMENT.

I.

THE PATTERSON CASE, 65 COLO. 166, DETERMINES THE EFFECT OF STATE STATUTES AND ANNOUNCES RULES OF PROCEDURE THAT ARE DECISIVE HERE.

This plaintiff brought its action in the State District Court to restrain the collection of the same taxes of 1913 now sought to be recovered in its first cause of action. The trial court sustained a general demurrer to plaintiff's bill and dismissed the suit. Upon writ of error, the same legal questions were urged upon the State Supreme Court that are now presented here in behalf of plaintiff. See *First National Bank v. Patterson*, 65 Colo. 166. In affirming the judgment of the lower court, that court said:

"It (plaintiff in error) concedes that it was cognizant of, and satisfied with, the assessment made by the assessor. But the law also made it cognizant of the fact that such assessment was subject to change by superior governmental agencies who were required to meet at certain places, on certain days, and complete their labors within designated dates. With full knowledge of the respective powers of these several boards to make corrections in assessments and adjustments in equalization, essential to bring about a complete and equitable assessment of all property within the state, it remained inactive until long after the tax was laid, when it applied for an abatement or rebate of the tax. The aforesaid tribunals were open to plaintiff in error, prior to the laying of the tax, but it refrained from seeking relief therein, and may not now complain" (p. 173).

It will be noted that the Patterson case thus decided at least two fundamental propositions that are vital to and, as we believe, conclusive of this inquiry:

First. That there were in fact superior governmental agencies or tribunals that were open to plaintiff prior to the laying of the tax. And,

Second. That because plaintiff refrained from seeking relief in such tribunals in apt time it cannot thereafter complain in the courts.

The declaration of the State Supreme Court that there were superior governmental agencies that were open to plaintiff prior to the laying of the tax is in fact an interpretation of the statutes of the state. And that interpretation will no doubt be accepted by this Court as binding upon it.

Farncomb et al. v. City and County of Denver,
et al., 252 U. S. 7, 10.

Londoner v. Denver, 210 U. S. 373, 374.

Western Union Tel. Co. v. Gottlieb, 190 U. S.
412, 425.

Price v. Illinois, 238 U. S. 446, 451.

But plaintiff does not allege in its complaint that it resorted to or sought relief in any of these superior governmental agencies prior to the laying of the tax, and it thereby admits that it did not. Had it done so, it was incumbent upon it to so allege in its complaint, as a condition precedent to its right to relief in the courts. Conditions precedent must always be alleged. That such is the law in Colorado is proved by the Patterson case itself. There, as here, the plaintiff failed to allege that it had sought relief before the superior governmental agencies, and the issue was there, as here, raised by demurrer to the complaint. It must, therefore, be taken as a settled fact that there were superior governmental agencies to which plaintiff might have resorted prior to the laying of the tax, and that it did not resort to them. In fact, the plaintiff concedes, on page 26 of its brief, that there was one superior governmental agency to which it might have resorted, but did not, prior to the laying of the tax. But we shall discuss that matter later.

The second proposition laid down in the Patterson case—that where the taxpayer aggrieved by an excessive assessment of his property fails to seek relief in apt time, before the assessing agencies established by law for the adjustment or correction of assessments, he is without right to complain in the courts—is everywhere recognized as fundamental. It has met the sanction of this Court.

We quote from *Farncomb et al. v. City and County of Denver et al.*, 252 U. S. 7, 11, *supra*:

“Plaintiffs in error did not avail themselves of the privilege of a hearing as provided by this section (of the Denver Charter), but after the assessing ordinance had been passed began this proceeding in the District Court to test the constitutionality of the law. As we have said, the question as to what should be a proper construction of the charter provision was not for our decision; that matter was within the sole authority of the state court, and was disposed of, as the Supreme Court of Colorado held, by the former cases reported in 33 Colorado, and by our decision based upon that construction in *Londoner v. Denver*, 210 U. S., *supra*. As the plaintiffs in error had an opportunity to be heard before the board duly constituted by section 300, they cannot be heard to complain now. It follows that the judgment of the Supreme Court of Colorado must be affirmed.”

In *Petoskey etc. Gas Co. v. Petoskey*, 162 Mich. 447, the Court, in holding that a taxpayer could not in an action at law recover certain alleged illegal and excessive taxes paid under protest, said at p. 452:

“In *Township of Caledonia v. Rose*, 94 Mich. 216 (53 N. W. 927), it was held that a taxpayer who fails to appear at the time and place provided for the board’s sessions is estopped from attacking the assessment.”

* * * * *

“In *Michigan Savings Bank v. City of Detroit*, 107 Mich. 246 (65 N. W. 101), it was held that boards

of review are the proper tribunals for the correction of unjust assessments, and that parties will not be heard in the courts, until they have exhausted their remedy before these tribunals." Citing numerous cases.

In *Ward v. Alsup*, 100 Tenn. 620, the Court said at p. 745:

"It has been held, that when, by a valid statute, a Board of Assessors or Equalizers is created with power to act, a taxpayer who fails to make application to such board for relief, when it has power to act, cannot pay under protest and then recover back the tax in an action for that purpose. It is said to be everywhere a settled rule that application must be made to the statutory tribunal provided for that purpose, if one is provided, before any legal action is taken to recover back the tax." Citing many cases in support of that doctrine.

To the point that the complaining taxpayer must exhaust his remedies before administrative boards, established by law for his protection, prior to bringing an action in court to recover alleged excessive taxes paid by him, we also cite:

Hodge v. Muscatine County, 196 U. S. 276, 281;
Stanley v. Supervisors of Albany, 121 U. S. 535,
550;

Michigan Savings Bank v. City of Detroit, 107
Mich. 246, 247;

Hinds v. Township of Belvidere, 107 Mich. 664,
667;

Coulter v. Louisville Bridge Co., 114 Ky. 42, 47;
Clay County v. Brown Lumber Co., 90 Ark. 413,
417;

Clark v. Board of Commissioners, 66 Minn. 304,
308;

State of Nevada v. Wright, 4 Nev. 251, 254;

Henne v. Los Angeles County, 129 Cal. 297, 299;
27 Am. & Eng. Enc. Law (2d Ed.) 759; 37
Cyc. 1079.

The Patterson case is not in conflict with the earlier cases of Kendrick v. A. Y. & Minnie M. & M. Co., 63 Colo. 214, and Spaulding Mfg. Co. v. La Plata County, 63 Colo. 438, relied upon by plaintiff. Even though it were in conflict with them, it would control. In the Kendrick case, the ruling simply was that the remedy of a property owner for the levy of an excessive tax thereon is to pay the tax and proceed at law under Section 5750, Rev. Stats. of 1908, and that injunction would not lie to restrain collection of the tax.

The proposition, laid down in the Patterson case, that the property owner must resort to the assessing tribunals for relief as a condition precedent to his right of action in the courts was not raised, determined, or considered in any manner in the Kendrick case, and the same is true of the Spaulding case, and of the case of County Commissioners of Bent County et al. v. A. T. & S. F. R. Co., 52 Colo. 609. In fact the Colorado Supreme Court has never held that the taxpayer *need not* exhaust his remedies in the administrative boards before resorting to an action in court to recover alleged excessive taxes paid, and in the Patterson case that court distinctly said that he must do so.

In fact, long prior to the Patterson case, the State Supreme Court had frequently recognized the universal doctrine that the taxpayer will not be heard to complain in the courts of overvaluation of his property unless he has already exhausted his remedies before the taxing tribunals.

Price v. Kramer, 4 Colo. 546, 554;

Breeze v. Haley, 10 Colo. 5, 12-13;

Barnett v. Jaynes, 26 Colo. 279, 282;

People ex rel. Hallett v. County Commissioners,
27 Colo. 86, 93.

To Require the Complaining Taxpayer to Exhaust his Remedies before Administrative Boards prior to bringing an Action in Court to recover alleged excessive taxes paid by him does not deprive him of any Constitutional Right.

Farncomb et al. v. City and County of Denver,
et al., 252 U. S. 7, 11, *supra*;

Dodge v. Osborn, 240 U. S. 118, 122.

We pause to note that in *Sioux City Bridge Co. v. Dakota County*, 67 L. Ed. 220, 223, cited by plaintiff here, the property owner first resorted to the superior taxing tribunal (the county board of equalization) for relief, and seems to have diligently followed the procedure laid down by the local statutes in establishing the foundation for relief in the courts.

*Administrative Boards that were Open to Plaintiff
Prior to the Laying of the Tax.*

In view of the express statement in the *Patterson* case (65 Colo. 173), that there were in fact administrative boards open to plaintiff prior to the laying of the tax, and wherein it might have sought relief, it seems like a work of supererogation to discuss this matter further, because, as above pointed out, that declaration of the State Supreme Court amounts to a construction of the state statutes and is thus binding on this Court.

None the less, we shall briefly show that such boards did exist and that plaintiff might have resorted to them for relief.

All property, except public utilities, is initially assessed by the county assessor (Sec. 5573, Rev. Stats. Colo., 1908, plaintiff's brief, p. 41).

If, in the opinion of any taxpayer, his property has been assessed too high or has been otherwise illegally assessed, he may present his grievance to the assessor "and if in any particular the assessment complained of is erroneous under the statutes, the assessor shall correct the same" (Sec. 4639, Rev. Stats. Colo., 1908, plaintiff's brief, pp. 45-46).

If the valuation fixed by the assessor exceeds \$7,500 (as it does here), the taxpayer must state his grievance in writing "stating the particular grounds of such objection, or the particular facts wherein such grievance consists." And "if such objection be overruled by the assessor, in whole or in part, he shall state briefly in writing the grounds of his refusal." The taxpayer may appeal from the decision of the assessor to the District or the County Court "on or before the first Monday in January following said assessment."

Before the allowance of the appeal the taxpayer must pay his taxes in accordance with the assessment. If the taxpayer "shall succeed in the County or District Court, in whole or in part, the treasurer shall refund such tax according to the judgment of such Court." The same section also allows interest at 10% per annum on any amount ordered to be refunded, and further provides, "That the said court shall not review or give relief against an assessment unless it shall appear manifestly excessive, fraudulent or oppressive. Both the assessor and the said County or District Court, in considering such statement of grievance by any such taxpayer, shall take into consideration the value *as fixed by the assessor upon other similar assessable property similarly situated*" (Sec. 5640, Rev. Stats. 1908, plaintiff's brief, pp. 46-47).

(NOTE: The word "following" in line 5 of Sec. 5640, as printed on p. 46, plaintiff's brief, should be "foregoing".)

Under the state constitution (Art. X, Sec. 15, plaintiff's brief, p. 40), the duty of the county boards of equalization is "to adjust and equalize the valuation of real and personal property within their respective counties." Under the statutes (Sec. 5761, Rev. Stats. 1908, plaintiff's brief, p. 47), the County Boards of Equalization meet in September of each year "for the adjustment and equalization of the assessment among the several taxpayers of their respective counties."

Thus far it appears that two tribunals were in fact open to plaintiff before the laying of the tax; and it did not resort to either of them.

First, It could have complained in writing to the county assessor, and required him to readjust the assessment, if erroneous, and in doing so to take into consideration the value, as fixed by him, upon other similar assessable property similarly situated; or

Second, It could have appeared before the county board of equalization to demand that its property be assessed upon the same relative basis as other property in the county.

It took neither of these steps. The excuse it offers for its failure to appear before the county board of equalization is that the duty of that board "to raise the assessment of other taxpayers" is a *public* duty (plaintiff's brief, p. 23). It does not follow that the board would have turned a deaf ear to any taxpayer who complained that his property was unfairly assessed as compared with other property, when the very duty enjoined upon it by the constitution was to "adjust and equalize" valuations of property.

Plaintiff (its brief, p. 24) cites *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, 521, wherein this Court considers the statutes of Kentucky and says that under them "The remedy of reassessment appears to be a public, not a private, remedy." That, of course, was a matter of construction of the statutes of that state. But it does not follow that, under the statutes of Colorado, a taxpayer whose property has been assessed too high, *as compared with other like property* is not entitled to be heard before the county board of equalization to demand the correction of that inequality. In fact, the Supreme Court of the State has said that *inequalities* in assessments as fixed by the county assessor are subject to correction by the superior taxing agencies of the state, *at the instance of the individual taxpayer*. In *Barnett v. Jaynes et al.*, 26 Colo. 279, the Court said, at page 282:

"If, as alleged, the real property in Mesa county was unequally assessed in 1890, and by reason thereof the valuation of the land in question was excessive, *as compared with other like property*, ample opportunities were afforded for the correction of such error. Mills' Ann. Stats., Secs. 3838, 3839, *et seq.* A party who fails to invoke these remedies cannot be heard to complain of errors in the valuation of his property after a sale has been made and the tax deed issued." (Italics ours.)

Section 3838, Mills' Ann. Stats., referred to in the above quotation, defined the powers and duties of the county board of equalization. That section was supplanted by Sec. 5761, Rev. Stats., 1908, but the two sections are substantially iden-

tical so far as they relate to the powers and duties of the county board. We print said Sec. 3838 as an appendix to this brief.

In *Hallett v. Board of County Commissioners of Arapahoe County*, 27 Colo. 86, the Court again referred to the statute defining the powers and duties of the county board, and said at page 93:

“The law has provided a forum—namely, the board of equalization, section 3838, *supra*—whose duty it is, *at the instance of anyone aggrieved*, to correct errors in the assessment roll returned by the assessor. Having failed to avail himself of the plain, speedy and adequate remedy thus afforded, to correct his assessment upon these grounds, or, at least, present these questions to the board, he cannot resort to proceedings *in certiorari* for that purpose.” (Italics ours.)

It thus appears that the State Supreme Court considers that the remedy of re-assessment exercised by the county boards, under the statutes of Colorado, is a private as well as a public remedy. And the whole question is one of construction of the local statutes.

Sections 31 and 32, Session Laws of 1911 (plaintiff's brief, pp. 61-62), provide that *on or before* the first day of October of each year the Colorado Tax Commission shall determine whether or not the property in the several counties has been assessed at its full value, and if it shall be of opinion that the taxable property in any county is not so assessed, it shall determine such increase in the valuation as will place said property on the assessment roll at its full cash value; and that, after making such determination, the commission shall transmit to the state board of equalization a statement of the amount to be added to the valuation in each county. And this was the authority under which the horizontal increases in question were recommended by the commission.

Section 15 of the same statute (Sec. 15, p. 618, Session Laws, 1911; plaintiff's brief, pp. 60-61), provides that the

commission "may receive complaints and carefully examine into all cases where it is alleged that property subject to taxation * * * has been fraudulently or for any reason improperly or unfairly assessed", etc.

As this Court aptly said in *Lander v. Mercantile Bank*, 186 U. S. 469:

"The board was a public tribunal, open to be invoked, and charged with duties, and necessarily subject to adjournments. What it had done the bank could have easily ascertained, and as easily what it contemplated doing. An inquiry would have ascertained both. By the exertion of a very trifling trouble the bank would have been informed of every meeting of the board."

Plaintiff (its brief, p. 26) concedes that it had a "theoretical" opportunity for a hearing before the tax commission, but offers two reasons why it did not seek such hearing: First, that "No appeal to a judicial tribunal was provided" should its complaint be rejected, and, second, that "the time at the disposal of the commission was inadequate to hear individual complaints." Both reasons are unsound. In the absence of any complaint by plaintiff it must be presumed that, had a meritorious complaint been made by it, relief would have been granted by the commission, and there would have been no occasion to appeal to any judicial tribunal. Moreover, even though the Act of 1911 provided for no appeal to a judicial tribunal, it was necessary, as has been shown, that the taxpayer should exhaust his remedies before the administrative boards before resorting to an action under Sec. 5750. Likewise it is idle for plaintiff to say that the time at the disposal of the commission was inadequate to hear individual complaints, when it made no complaint.

We quote from *Collins v. City of Keokuk*, 118 Ia. 34, 35:

"The charter of Keokuk makes the city council a board of equalization to hear and correct mistakes and inequalities in the assessment of property, and

the remedy thus provided is exclusive. * * * It is urged that this remedy is inadequate because there is no provision for an appeal, and plaintiff is thereby deprived of a constitutional right. There is no claim made, however, that plaintiff did not have timely notice of the assessment, or that he ever sought relief therefrom at the hands of the equalizing board; and he cannot proceed upon the assumption that such board would not have done justice in the matter, or that there would have been any occasion for the exercise of the right of appeal had such right been given. On the contrary, the presumption, if any, must be that any excess in the assessment of plaintiff's property would have been remitted by the board upon proper showing made."

Speaking of Section 15 of the Act of 1911, the Court said, in *Colorado Tax Commission v. Pitcher*, 56 Colo., at p. 373:

"Furthermore, the tax commission, by Sec. 15 of the act, is expressly authorized to receive complaints, and carefully examine into all cases, where it is alleged that property, subject to taxation, has not been assessed, or has been fraudulently or for any reason improperly or unfairly assessed, etc. Here is an express provision for an opportunity to be heard which, with the notice given by the statute of the time and place of the meeting of the tax commission, surely constitutes due process of law."

Thus, the opportunity of plaintiff to be heard before the tax commission was not only theoretical but real.

The final equalizing body is the state board of equalization. Of the functions of that board, it is said in *Colorado Tax Commission v. Pitcher*, 56 Colo. at p. 374:

"Moreover, after the tax commission completes its labors, and transmits its assessment to the state board of equalization, the latter body meets in regular

session, at a place and time designated by statute to perform its constitutional duty of equalizing the valuations among the several counties. In that respect it is supreme, except that it cannot change the aggregate of the total valuation of all the counties. It may decrease the valuation of one or more counties by raising the valuation in others and correct any inequalities in that respect.”

We submit that the following points have now been established:

1. That there were in fact superior governmental agencies or tribunals open to plaintiff and wherein it might have sought relief prior to the laying of the tax.

2. That plaintiff was bound to seek redress by application to those tribunals before resorting to the courts, and that an action does not lie, under Sec. 5750, Rev. Stats., 1908, to recover alleged excessive taxes paid unless the taxpayer has already exhausted his remedies before such tribunals.

3. That to require the property owner, who complains that his property has been assessed too high, to resort to the assessing agencies established by law for his relief, as a condition precedent to his right of action in court to recover alleged excessive taxes paid, does not deprive him of any constitutional right.

4. That it was incumbent upon plaintiff to allege in its complaint that it had exhausted its remedies by due application to the governmental tribunals open to it.

If these points are well taken, it necessarily follows that the demurrers to the respective complaints were properly sustained.

II.

NO DENIAL OF EQUAL PROTECTION OF
THE LAWS.

We have already shown that it was incumbent upon plaintiff to present its claim of inequality in the assessment of its property in due season to the assessing agencies of the state.

Moreover, this Court holds that mere inequality in taxation is not violative of the Fourteenth Amendment, unless such inequality is based upon arbitrary distinctions.

Shaffer v. Carter, 252 U. S. 37, 58.

“Inequality, we repeat, is nothing unless it was in pursuance of a scheme.” Coulter v. Louisville & Nashville R. Co., 196 U. S. 599, 610.

See also: Chicago, Burlington & Q. Ry. Co. v. Babcock, 204 U. S. 585, 597.

Southern Ry. Co. v. Watts, 43 Sup. Ct. Rep. 192, 195.

To support a claim of discrimination “there must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity.” Sioux City Bridge Co. v. Dakota County, 67 L. Ed. 220.

“The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” Sunday Lake Iron Co. v. Wakefield Tp., 247 U. S. 350, 352.

And the basis of the decision in Taylor v. Louisville & Nashville R. Co., 31 C. C. A. 537, was habitual and intentional discrimination against the complainant by the assessing officers.

The good faith of the assessing officers is presumed, and there is nothing in these complaints whereon to predicate any claim of intentional and arbitrary discrimination on the part of the duly constituted agents of the state.

In fact, these complaints make no charge whatever of any intentional or arbitrary discrimination against plaintiff, in the fixing or adjustment of these assessments; nor does any such implication arise from the matters set forth in the complaints. Without such an allegation there is no question of discrimination involved in this case.

Albuquerque Bank v. Perea, 147 U. S. 87, 89.

The only charge of intentional and arbitrary discrimination to be found in either of these complaints, appears in paragraph XVI of the "First Cause of Action" in the amended complaint (Transcript, p. 21). That charge was a mere afterthought, because the avowed purpose of the amended complaint was only "to enable plaintiff to state the facts in better sequence and more concisely" (plaintiff's brief, p. 8). The first cause of action in the amended complaint deals solely with the assessment of 1913, which was wholly completed in that year (Par. X, Transcript, p. 19); and the assessment roll was delivered to the county treasurer "with the assessor's warrant for collection thereof on or about the first day of March, A. D. 1914" (Par. XI, Transcript, p. 19).

Now it appears from said paragraph XVI, that about April 29, 1914—which was long after the tax was laid—plaintiff filed with defendant county board "its petition for abatement and rebate" of the alleged excessive taxes of 1913; that in May, 1914, defendant board certified said petition to the Colorado Tax Commission for its approval or disapproval, and that said commission thereafter disapproved the same; that "the remaining banks in said county filed like petitions for abatement and rebate", and that such petitions were likewise disapproved by the tax commission. Paragraph XVI then charges that, "*By virtue of the premises* said Colorado Tax Commission made a systematic, intentional and arbitrary discrimination against plaintiff

and the other banks of said Weld County by refusing to afford them relief against excessive, illegal and unjust burden of taxation" (Transcript, p. 21).

It will at once be noted that it is not claimed that the tax commission made any intentional or arbitrary discrimination against plaintiff in the process of determining the amount of the assessment upon its property. The charge of discrimination is predicated solely upon the fact that the commission disapproved the application for abatement and rebate filed long after the process of assessment was entirely completed.

It has above been shown that avenues of redress were open to plaintiff while the processes of assessment and equalization were under way, and that it ignored them. It could, for instance, have appeared before the county board of equalization in September, 1913, and demanded that it perform its constitutional and statutory duty of *equalizing* its assessment as compared with others, and thus placed itself on an equality with other taxpayers before the horizontal raise was imposed. It concedes that it had an opportunity to be heard before the tax commission before the tax was laid, but it brushed that aside also. It may well be that the very reason the commission disapproved the petition for abatement and rebate, filed long after the tax was laid, was that plaintiff had neglected to invoke in due and proper season the means of redress open to it. Surely the refusal to grant a rebate to a taxpayer who had so slept upon its rights, does not support the charge of "systematic, intentional and arbitrary discrimination" found in the amended complaint.

Indeed, the single fact that the alleged excessive valuations of the property of plaintiff were occasioned by *horizontal raises* of valuations of *all property in the county* initially assessed by the county assessor, rather than by *increases specifically imposed upon the property of plaintiff* and other banks, goes very far to prove that the tax commission had no idea of discriminating against plaintiff or against banks in general.

In speaking of the reason for establishing the tax commission, the Court said, in *Colorado Tax Commission v. Pitcher*, 56 Colo. at page 376:

“It, no doubt, became apparent to the general assembly that the assessment of property could not be entrusted solely to the local assessors and local boards, for the reason that such officials continually assessed property far below its real value, justifying their acts in that respect on the assertion that other counties did likewise. Indeed, history discloses that such has been the experience of many of the states of the union, and the imperative necessity, there as here, has required the creation of central bodies with power to correct assessment rolls, and increase or lower the valuations placed upon property for taxation purposes by the local authorities.”

So it appears it was notorious that the local authorities generally had long been accustomed to assessing property far below its real value because other counties did likewise. The main object of such conduct was to enable the county to escape its fair share of *state* taxes. For, obviously, the fixing of low valuations in the county would not have the effect of reducing the local taxes. It would only have the effect of requiring the imposition of a higher *rate of taxation* for local purposes.

Presuming, as one justly may, the good faith of the tax commission and of the state board of equalization, we submit that the only fair inference from this record is—that these officers had ascertained that taxable property generally throughout Weld County had been grossly undervalued by the local officers; that the undervaluation was so widespread and general that it had every appearance of being universal, and that therefore a horizontal raise was considered the appropriate means of bringing the assessments to the legal standard of “full cash value”.

The first cause of action in the amended complaint alleges that the property of the “remaining taxpayers”

(other than banks) of the county, that is assessable by the county assessor, was assessed by him in 1913 at 61 per cent of its full cash value (Transcript, p. 17), while in the second cause of action it is alleged that in 1914 the property of the remaining taxpayers was assessed by the county assessor at 80 per cent of its full cash value (Transcript, p. 24). In 1913 the horizontal raise later imposed was 63 per cent. In 1914 it was only 25 per cent. The tax commission act seems to have been working fairly well in producing ultimate and permanent equality by forcing assessments of property generally to full cash value.

This action was brought in March, 1921. Plaintiff makes no complaint of overvaluation of its property save for the years 1913 and 1914, though six years have intervened. In the Sunday Lake case (247 U. S. 353) this Court said that it was more than probable that the real estate there involved was assessed, by a newly organized state agency, relatively higher than other lands within the county; but added:

“Its action is not incompatible with an honest effort in new and difficult circumstances to adopt valuations not relatively unjust or unequal. * * * The very next year a diligent and, so far as appears, successful effort was made to rectify any inequality.”

That language well applies here. The efforts of the tax commission, we feel warranted in saying, have wrought equality in assessments to the satisfaction of plaintiff.

Cases Distinguished.

In *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, it appeared that the “franchise” of plaintiff was assessed by a state board of valuation and assessment at 75 per cent of its fair cash value; that the other assessing officers of the state, in the taxing year 1914-1915, and for many years preceding, had habitually, intentionally, systematically and generally, assessed the vast bulk of property of other descriptions in the state at not over 52 per cent of its fair cash value; that said board had denied to plaintiff the benefit of equalization; that said board had no authority

or control over the other assessing officers, nor did such other assessing officers have any authority or control over said board, and there was no statutory provision for equalizing assessments as between the property assessed by the board and that assessed by the other assessing officers.

This Court there held (p. 514) that discriminatory taxation that violated the state constitutional provision requiring uniformity would be redressed in the Federal Courts "when the discrimination results from divergent action by different assessing boards whose assessments are not subject to any process of equalization established by the state, and where the diverse results are the outcome, not, indeed, of any express agreement among the officials concerned, but of intentional, systematic and persistent undervaluation by one body of officials, presumably known to and ignored by the other body, so that in effect the two bodies act in concert."

But the facts in the Greene case do not fit the case at bar. In that case there was a long continued, intentional, systematic and persistent undervaluation by one body of officials, of the property subject to assessment by them, and their conduct was presumably known to and ignored by the other body—the board of valuation. The two bodies acted in concert to bring about and perpetuate inequality; while here we find the tax commission making a determined effort to bring about equality, not only in Weld County, but throughout the state by forcing assessments to full cash value everywhere. Horizontal raises were recommended by the commission in 1913 in 58 of the 63 counties (Pitcher case, 56 Colo. 345). There is no charge, nor is there room for any inference, in either of these complaints that the tax commission knew, or had reason to believe, that the Weld County assessor had already assessed plaintiff's property at full value when he had assessed the other property in the county at only 61 per cent of its value. In the Greene case the inequality came about and was persisted in because the various assessing officers, acting in concert, consciously so willed it. In the case at bar the alleged inequality remained despite the efforts of the tax commission to produce universal equal-

ity, and it remained solely because the plaintiff itself slept upon its rights during the whole of the assessing process. In the Greene case the only way of redress open to plaintiff at any time was to invoke the courts, because the various assessing officers had no supervision over one another, and there was no provision for equalizing assessments as between property assessed by the various boards or officers. While here the plaintiff did have ample opportunities of protest and review, as shown above, but which it neglected.

Further, it will be noted that the decision in the Greene case is rested solely upon the provision of the state constitution requiring uniformity in taxation, and not upon any question raised under the Fourteenth Amendment.

With that in mind, we direct attention to the fact that in the Patterson case (65 Colo. 171) the point was raised that part of the very taxes here sought to be recovered was levied in violation of the uniformity clause of the Colorado State Constitution, and the Court there held that "plaintiff in error has not been deprived of either a constitutional or statutory right, or suffered any wrong of which it can justly complain" (p. 172).

In *Londoner v. Denver*, 210 U. S. 373, 374, a case involving the validity of certain special assessments for local improvements, this Court said:

"The Supreme Court (of the State) held that the tax was assessed in conformity with the constitution and laws of the state, and its decision on that question is conclusive."

In *Stanley v. Supervisors of Albany*, 121 U. S. 535, 550, this Court said:

"Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them—of animals, houses, and lands in constant use. The most that can be expected from

wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the constitutions of some states is complied with, when designed and manifest departures from the rule are avoided."

Here there was no designed departure from the rule of uniformity. In the Greene case there was.

We quote from *People ex rel. v. Henderson*, 12 Colo. 369, 376:

"Upon this subject Mr. Justice Matthews, delivering the opinion in the Kentucky Railroad Tax Cases, *supra*, says: 'The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' Of course instances of injustice and hardship will sometimes result under the statute before us; but this is necessarily true of all statutes providing methods for the assessment and taxation of property. Exact uniformity and mathematical accuracy in valuations are absolutely impossible. Nothing that can be devised by human reason will secure such exactness or accuracy. To use the expressive words of Mr. Justice Miller in *State Railroad Tax Cases*, 92 U. S. 575, 'perfect equality and perfect uniformity of taxation as regards individuals or corporations or the different classes of property subject to taxation is a dream unrealized.' And if the constitutional requirement as to equality and uniformity of taxation imperatively commanded absolute exactness, in the language of Judge Cooley 'the operations of the government must come to a stop'."

In *Cummings v. Merchants National Bank*, 101 U. S. 153, this Court held that the Federal Courts would afford relief by injunction against a discriminatory assessment of

the shares of stock of a national bank. But it there appeared, as pointed out in the Patterson case (65 Colo. 173), that the discrimination was brought about through concert among, and agreement between, the assessing officers, amounting in effect to conspiracy and actual fraud. The wrong was deliberate and intentional and the local statutes afforded no means of redress through any supervisory board with authority over all to finally fix values.

In Raymond v. Chicago Union Traction Co., 207 U. S. 20, it appears that the assessing board *adopted a system* of valuation differing wholly from that applied to other corporations of the same class, resulting in discrimination against the company, and that the local statutes provided no manner of appeal from the decision of the board. The only resort at any time available to the party aggrieved was the courts.

In Union Tank Line Co. v. Wright, 249 U. S. 275, this Court found that "plaintiff in error's property was appraised according to an *arbitrary* method which produced results wholly unreasonable." And here likewise it does not appear that any method of review or correction was provided by the state laws.

III.

PLAINTIFF WAS NOT DEPRIVED OF DUE PROCESS OF LAW.

In that plaintiff had the right to be heard before the assessing agencies of the state, as above shown, it was accorded due process of law.

Farncomb v. City and County of Denver, 252 U. S. 7, 10;

Michigan Central Railroad v. Powers, 201 U. S. 245, at pp. 301, 302;

Hibben v. Smith, 191 U. S. 310, 322;

Turpin v. Lemon, 187 U. S. 51, 57;

Colorado Tax Commission v. Pitcher, 56 Colo. 343, at p. 373.

And since the time and place of meeting of these various agencies are fixed by law, no specific notice to the taxpayer was necessary.

Lander v. Mercantile Bank, 186 U. S. 458, 469;

State Railroad Tax Cases, 92 U. S. 575;

Pittsburg etc. Ry. Co. v. Backus, 154 U. S. 421, 425;

Bi-Metallic Investment Co. v. State Board of Equalization, 239 U. S. 441, 445.

Surely the right of plaintiff to invoke relief from the superior governmental agencies that were open to it before the tax was laid, together with its right to test the validity of the tax by an action under Section 5750, Rev. Stats. 1908, *after it should exhaust its remedies without avail in these administrative boards*, was sufficient to constitute due process. But a fundamental difficulty with plaintiff's case is that it deliberately and persistently ignored all the remedies open to it before the tax was laid, with the result that it lost any right it otherwise may have had to relief under that section.

IV.

THERE WAS NO VIOLATION OF PLAINTIFF'S RIGHTS UNDER SECTION 5219, U. S. REVISED STATUTES.

Plaintiff claims that its rights, and those of its shareholders, under Sec. 5219, U. S. Rev. Stats., were violated in that it was subjected to a higher tax *for state purposes* "than monied capital in all other counties in Colorado" (its brief, p. 33). The averments whereon this contention of plaintiff is predicated are substantially as follows: That the county assessor assessed "plaintiff's property" at its full cash value in making the initial assessment thereof for each of the two years in controversy; that the county assessors "in other counties in the State of Colorado during said fiscal year * * * followed the same rule relative to bank property in their initial assessment thereof as did the assessor of said Weld County"; but that the horizontal raise

thereafter imposed by the tax commission and the state board of equalization upon property generally, including banks, in Weld County was 63 per cent in 1913 and 25 per cent in 1914, whereas in "many other counties" no horizontal increase at all was imposed, and in still other counties the directed horizontal increase for each of the two years was less than the increase in Weld County. (See paragraphs V. XIII and XV, Transcript, pp. 17, 20-21 and paragraphs IV and XII, Transcript, pp. 23-24 and 25-26).

Plaintiff claims no discrimination, violative of said Sec. 5219, as to *county or other local taxes*, but only as to state taxes; and that claim is founded upon its averments that bank property in Weld County was initially assessed at full value and that county assessors in "other counties" followed the "same rule" in the assessment of bank property, but that the horizontal increases thereafter imposed by the tax commission and the state board of equalization were not uniform throughout the state. And plaintiff alleges that as the result of the horizontal increases in Weld County in 1913 and 1914 its state taxes were rendered excessive to the extent of \$194.69 in 1913, and \$80.53 in 1914 (paragraph XV, Transcript, pp. 20-21 and paragraph XIV, Transcript, p. 26), making a total of but \$275.22, an amount far below what is required to invest the lower court with jurisdiction of the controversy.

Moreover, the facts of this case do not make out a case of discrimination against shareholders of national banks such as was intended to be prohibited by said Sec. 5219.

With reference to the horizontal increase of 1913 the State Supreme Court said in the Patterson case, 65 Colo. 172:

"The alleged overvaluation was the result of a flat increase ordered by the State Tax Commission, and by the State Board of Equalization, upon the aggregate value of all the property within the county, originally assessed by the assessor, and imposed by the aforesaid central tax assessing agencies, in strict conformity with the provisions of Section 31 of the Act of 1911, Chap. 216, p. 623."

By Sec. 31 of the Act of 1911, printed in plaintiff's brief at page 61, it was made the duty of the tax commission to "determine the increase or decrease in the valuation" in each county "by such rate per cent, or such amount as will place said property on the assessment roll at its true and full cash value." And obviously these increases of 1913 and 1914 were imposed by the tax commission and the state board of equalization for the purpose of fulfilling the express mandate of the statute and for no other purpose. Indeed, it is nowhere charged in these complaints that these assessing officers had any other purpose, or that they knew or had reason to believe that their efforts to produce equality everywhere would result in any inequality anywhere.

Section 5219 was designed to prevent hostile or unfriendly discrimination against national banks, as the result of state action whether legislative or administrative, and "the language of the act of Congress is to be read in the light of this policy."

Mercantile Bank v. New York, 121 U. S. 138, 155.

Amoskeag Savings Bank v. Purdy, 231 U. S. 373, 390.

To make out a case under Sec. 5219, designed or intentional discrimination must be shown. "Accidental inequality is one thing, intentional and systematic discrimination another."

First National Bank v. Albright, 208 U. S. 548, 552.

Also—Supervisors v. Stanley, 105 U. S. 305, 318.

National Bank v. Kimball, 103 U. S. 732, 735.

Plaintiff should have applied for relief in apt time to the assessing tribunals open to it.

Stanley v. Supervisors of Albany, 121 U. S. 535, 550.

Mechanics National Bank v. Baker, Receiver, 65 N. J. Law, 113, 120 (affirmed in 65 N. J. L. 550).

First National Bank v. Patterson, 65 Colo. 166, 173.

Cases Distinguished.

In *Pelton v. Commercial National Bank*, 101 U. S. 143, it clearly appeared that national bank shares were deliberately and intentionally valued by the local assessing officers at a higher rate than that applied to other monied capital; and that a state board of equalization, whose jurisdiction extended to bank shares only and which "could do no more than increase or diminish the valuation of banks for each county and city, so as to make them conform to some standard of equality among themselves", increased the assessment made by the local officers.

The *Pelton* case differs from this one in at least two vital respects: (1) These complaints do not allege that the local assessor made any discrimination whatever, much less an arbitrary one, between national bank shares and other monied capital. Nor do they allege that the tax commission or the state board of equalization made any arbitrary or intentional discrimination against plaintiff's shareholders when the horizontal raises were ordered; (2) In the *Pelton* case there was no adequate means of redress by application to the taxing agencies themselves, and in the *Patterson* case the State Supreme Court said that such means of redress were open to this plaintiff if invoked in due time.

Whitbeck v. Mercantile National Bank, 127 U. S. 193, like the *Pelton* and *Hubbard* cases, arose in Ohio. In the *Whitbeck* case it appeared that certain national bank shares were assessed by the local agencies upon the same basis of valuation as other monied capital, that is to say, at 60 per cent of their real value. The "State Board of Equalization for incorporated banks" made an order increasing the valuation to 65 per centum. It was claimed that this was discrimination forbidden by Sec. 5219, and this Court so held. The Court, however, seems to have regarded the case as a close one and said "the matter is not altogether free from difficulty" (p. 195). The Court pointed out that, while the method of equalization pursued by the state board of equalization would not as an absolute necessity result in discrimination, yet one of the probabilities was that it would so result.

In *Mercantile National Bank v. Hubbard*, 105 Fed. 809, it was held that an increase in the valuation of the shares of a national bank, made by a state board of equalization without notice to the bank or its shareholders, was void for want of jurisdiction. But that case was reversed by this Court *sub nomine* *Lander v. Mercantile Bank*, 186 U. S. 458. This Court, after citing *The State Railroad Tax Cases* and others, there said at p. 469, as partly already quoted to another point herein:

“We do not think the principle of those cases is affected by an adjournment of the Ohio board without fixing a date of meeting. How were the rights of the bank affected and to what inconvenience was it put? It did not appear at the first meeting of the board. It rested on the evidence it had returned to the auditor, and it knew that the report it had made to the comptroller of the State would be before the board, and it knew also the duties and power of the board. The board was a public tribunal, open to be invoked, and charged with duties, and necessarily subject to adjournments. What it had done the bank could have easily ascertained, and as easily what it contemplated doing. An inquiry would have ascertained both. By the exertion of a very trifling trouble the bank would have been informed of every meeting of the board.”

V.

FIRST NATIONAL BANK v. PATTERSON,
65 COLO. 166.

The Patterson case has already been mentioned and quoted from herein, but will now be discussed more at length in reply to the “Fourth” division of plaintiff’s brief.

In that case it was sought to enjoin the collection of that part of the tax of 1913 then, as now, claimed to be excessive. The same counsel who appeared as attorney for plaintiff in error there appears in the same capacity here.

The issue there, as here, was raised by demurrers to the complaint. The trial court sustained the demurrers and

dismissed the complaint. On writ of error the plaintiff contended—briefly stated:

(a) That by the action of the trial court it was denied the protection of Sec. 3, Article X of the state constitution, and the equal protection of the laws guaranteed by the Fourteenth Amendment;

(b) That it was denied the rights afforded it by Sec. 5219, U. S. Revised Statutes;

(c) That it had exhausted without avail every means of redress afforded it through the administrative officers, and that the veto by the tax commission of the recommendation of the local officers in its behalf precluded relief except in the courts;

(d) That the lower court "did not give plaintiff the statutory right it had under Section 21 of the Code of Civil Procedure to have judicial determination of plaintiff's liability to defendant, County Treasurer."

(e) "That irrespective of the action being justly treated as one at law under Section 21 of the Code, plaintiff was also entitled to ancillary injunctive relief, denial of which, coupled with dismissal of its action at its costs, was reversible error under the Federal Constitution and said Federal statute" (pp. 171-172).

The first sentences of the opinion read:

"After a careful consideration of the complaint, the points relied upon for reversal, and contention of counsel, in support thereof, we are of the opinion that the judgment of the trial court was proper, and the plaintiff in error has not been deprived of either a constitutional or statutory right, or suffered any wrong of which it can justly complain. The injustice and discrimination, if any, arise wholly from an alleged overvaluation of property for taxation purposes, enforced by action of the State Tax Commission and the State Board of Equalization. No claim is made of actual fraud or intentional wrong."

That finally disposes of the claim that plaintiff's rights under the state constitution were violated.

Londoner v. Denver, 210 U. S. 374.

The language quoted also shows that the Court intended to and did decide the whole controversy upon its merits. The Court did not say merely that plaintiff could not justly complain *in equity*; it said that plaintiff had not "*suffered any wrong* of which it could justly complain". The decision means, we respectfully submit, that plaintiff was not entitled to any relief either at law or in equity, and that therefore it was not necessary to determine whether or not the action could stand as one at law under the code provision urged by plaintiff in error.

Code Section 21 is printed at page 67, plaintiff's brief. And it provides that:

"An action may be brought by one person against another for the purpose of determining a claim, which the latter makes against the former for money or property upon an alleged liability, and also against two or more persons for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as security."

Now the bill of complaint in the Patterson case alleged that Patterson, the county treasurer, was insisting upon the payment of these alleged excessive taxes of 1913 and was threatening to distrain plaintiff's property to enforce collection thereof (p. 170). The case seems, therefore, to have fallen directly within that code provision, which plaintiff in error there was urging. Yet the Court did not discuss the effect of Code Sec. 21 at all. Obviously, the Court passed over that section without comment because of the fact that it had at the very beginning of the opinion decided that plaintiff in error was entitled to no relief on the merits, whether the code section was applicable or not. Or, in other words, that the question of liability of the bank to the county treasurer would have to be resolved in favor of the treasurer even though Sec. 21 were deemed applicable to the situation and the plaintiff in error given the benefit of it.

There is, we submit, no merit in plaintiff's claim that the Patterson case does not hold that a complaining taxpayer must exhaust his remedies before the administrative agencies before bringing an action at law to recover taxes paid. The Patterson case itself was, as this plaintiff then claimed, an action both at law and in equity—in equity, for an injunction, and at law to determine, under the code, the claim for these taxes of 1913 that the defendant was threatening to enforce against it. Yet the Court said, as a reason for affirmance of the judgment below, that:

“The aforesaid tribunals were open to plaintiff in error prior to the laying of the tax, but it refrained from seeking relief therein, and may not now complain” (p. 173).

It said that in the face of the fact that the plaintiff in error was right then and there complaining, as its attorney insisted, *both at law and in equity*. So the Court must have meant to hold that plaintiff in error had, by its neglect lost its right to complain, whether at law or in equity. And Judge Carland, we submit, was correct in saying that “the Supreme Court affirmed the judgment of the lower court on the ground that the bill did not state sufficient facts to warrant the relief prayed for either at law or in equity” (Transcript, pp. 40-41).

We have above shown that courts everywhere hold that actions to recover alleged excessive taxes paid do not lie unless the taxpayer has already duly invoked his statutory remedies before the administrative agencies established for the protection of his rights. The Patterson case merely followed this uniform rule and had the effect of construing Sec. 5750, Rev. Stats. Colo., 1908, to conform therewith.

What reason, indeed, would there have been in saying that, although the taxpayer must exhaust his remedies in the assessing tribunals before going into *equity* for relief, yet that he might lie idly by, blithely putting aside all the means of redress during the assessment proceedings that the state laws had carefully provided for his protection, pay his taxes,

or a part of them, under a formal protest and then maintain a suit *at law* years afterward for recovery on the ground of overvaluation of his property? We venture to say that the Colorado Court did not mean to hold, in the Patterson or in the Kendrick case or any other, that such a thing could be done.

There was no occasion for the Court to overrule the Kendrick case. There is no conflict between them. In the Kendrick case the Court held that the taxpayer should proceed at law under Sec. 5750, rather than in equity. But it did not hold that all the steps leading to the remedy at law could be ignored, as was done by present plaintiff, and a cause of action still exist. The fact that a party may proceed at law does not mean that he can maintain his suit regardless of insufficiency of facts to entitle him to legal relief.

We confidently believe that in the other litigation now pending in the State courts, rather gratuitously alluded to by counsel for plaintiff, the State Supreme Court will follow its decision in the Patterson case, and hold that the actions cannot be maintained unless it be shown that the taxpayer had laid the foundation for a court action by submitting its grievances to the assessing tribunals in apt time.

VI.

THE ACTION WAS PREMATURELY BROUGHT.

There is an additional reason why this suit cannot be maintained for recovery of the alleged excessive taxes of 1914. Sec. 1220, Rev. Stats. of Colo., 1908 (printed in plaintiff's brief, p. 57), provides, *inter alia*, that "All claims and demands held by any person against a county shall be presented for audit and allowance to the board of county commissioners of the proper county, in due form of law, before an action in any court shall be maintainable thereon", etc.

The first cause of action alleges, as above shown, that plaintiff, in April, 1914, petitioned defendant county board for an abatement and rebate as to the taxes of 1913, but which petition met the disapproval of the tax commission

(Transcript, p. 21). But with regard to the taxes of 1914 it does not appear that any demand for rebate or refund was ever made upon defendant board until February 18, 1921 (Transcript, pp. 11, 27). While this suit was brought March 8, 1921 (Transcript, p. 1), a period of 18 days later.

Construing this statute, it was said in *Denver v. Bottom*, 44 Colo. 308, 310:

"If the claim here sued upon is a legal liability of the new county, as to which we express no opinion, plaintiff was not, under this statute, entitled to maintain an action in court to enforce it, unless he had previously presented the demand to its board of commissioners for audit and allowance and the same had been disallowed. There is no allegation in the complaint that he complied with this provision of the law, and his pleading was therefore fatally defective."

See also: *Gregg v. Lake County*, 32 Colo. 361.

In *Rio Grande County v. Bloom*, 14 Colo. App. 187, 189, the Court said:

"There is no doubt a plaintiff must prove the presentation of his claim to the board of county commissioners for audit and allowance, and it must be rejected, or a reasonable time for action must elapse before he may commence an independent suit to recover it. This question has been indirectly considered by this court several times, though we have had no occasion to decide it."

We quote from *Commissioners v. Walker*, 66 Colo. 312, 315:

"We think that the board is entitled to a reasonable time in which to investigate a claim against the county, and that in view of the facts in this case, where but a few days had elapsed after it was laid over for investigation, and that the board had held no subsequent meeting, the appeal was prematurely taken and the claim should not have been allowed in this proceeding."

The objection that the complaint does not show compliance with this statute and that the action was prematurely brought "may be raised at any time". *Rio Grande County v. Phye*, 27 Colo. 107, 110.

Sec. 1190, Rev. Stats. Colo., 1908, provides that:

"Each board of county commissioners shall meet at the county seat of each county on the first Monday in January, April, July and October in each year, and at such other times as in the opinion of the board the public interest may require."

Neither in the original nor in the amended complaint does the "second cause of action" allege that defendant board ever rejected plaintiff's demand for refund on account of 1914 taxes. Nor is it alleged or shown that a reasonable length of time had elapsed after the claim was presented for audit and allowance and before the suit was brought. Indeed, it is not even shown that the board held any meeting between the time the claim was presented and the date suit was filed. Under the statute as above quoted the board was not required to meet until the following April.

Said Sec. 1220 was not repealed as to tax matters, by Sec. 5, p. 528, Session Laws of 1913 (printed at p. 64, plaintiff's brief). The only effect of said Sec. 5 was to deprive the county board of the right under Sec. 5750 to refund taxes (not already found by a court judgment to be erroneous or illegal) unless it should first obtain the approval of the tax commission (*Patterson case*, 65 Colo. p. 176).

The function of the county board, under Sec. 1220, to audit and allow or disallow the claim in the first instance, still remained unimpaired. In fact, Sec. 5 itself provides that the county commissioners must conduct a hearing, and afford the county assessor an opportunity to be present, before any refund shall be allowed by them (plaintiff's brief, p. 64).

It is therefore clear that it was incumbent upon plaintiff to allow defendant board reasonable opportunity to allow or disallow its claim for refund on account of 1914 taxes, and that it has not shown that it did so. Regardless of all other considerations, then, the demurrer to the second cause of action was properly sustained.

CONCLUSION.

Summarizing—we contend that:

1. The Patterson case settles the proposition that, because plaintiff did not invoke the means of redress open to it through application to the assessing officers before these taxes were laid, it is now without right to maintain this action.

2. And further, that case is conclusive that the taxes of 1913 were valid under the constitution and laws of Colorado; and that, since no new or additional objection has been here urged as against the taxes of 1914, that case is decisive of the like validity of those taxes also.

3. There is no merit in any of the federal questions urged by plaintiff.

4. The demurrers to the "second cause of action" in the original and amended complaints, respectively, were properly sustained, for the additional reason that the action was prematurely brought as to the taxes of 1914 therein sought to be recovered.

We therefore respectfully submit that the judgment below should be affirmed.

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APPENDIX.

Section 3838, Mills' Annotated Statutes, Edition 1891.

(BOARD OF EQUALIZATION IN COUNTIES.) The county commissioners of each county in this state shall constitute a board of equalization, for the correction and completion of the assessment-rolls of their respective counties. Said board shall hold two regular meetings in each year at the office of the county clerk, at the county seat, as follows, viz.: Commencing on the first Monday in July, and continuing not less than three (3) nor more than ten (10) consecutive days, and on the third Monday of July, and continuing not less than two nor more than ten consecutive days. Said board shall, at its first meeting, have power to supply omissions in the assessment-roll, and, for the purpose of equalizing the same, may increase, diminish, alter or correct any assessment or valuation. In case any material changes are made by said board, in the assessment of any person or persons at said first meeting, the county clerk shall, at the close of said meeting, notify said person or persons by letter, through the post-office, by mailing the same, and prepaying the postage thereon, or otherwise, that such change has been made. Said service through said post-office shall be deemed personal and sufficient, if properly addressed to said person or persons at the post-office nearest their residence. Said board shall, at its second meeting, sit to hear complaints, only from those dissatisfied with said changes, or otherwise, and shall have power to adjust said assessment-roll as, in their judgment, is just and proper; *Provided*, That, in case the time provided herein for holding either of said meetings shall prove too short for the full consideration of all cases for adjustment, the board of county commissioners may, by order, entered of record, extend the time of either of said meetings to such day as, in their judgment, the business of such meetings, or either of them, may require, such extension not to exceed ten days in any case.

WILLIAM R. KELLY,

Attorney for Defendant in Error.



JAN 15 1924
WM. R. STANSBURY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1923.

No. 180.

THE FIRST NATIONAL BANK OF GREELEY,
PLAINTIFF IN ERROR,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE
COUNTY OF WELD, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLORADO.

REPLY BRIEF OF PLAINTIFF IN ERROR.

HARRY N. HAYNES,
Attorney for Plaintiff in Error.

(29,317)



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I.

Equal Protection of the Laws.

Upon the facts admitted by demurrer it is beyond dispute that the administrative officials of the State and of its public subdivisions in the years 1913 and 1914 made an unjust

discrimination and grossly excessive assessment for taxation of the banks in Weld County as compared with all other taxable property therein and as compared with bank property and moneyed capital in all other counties of the State subject to the same State levies.

This discrimination was due to no fault of plaintiff or at any other bank in the county, but was solely due to failure of administrative officials properly to perform their *public duties*. To affirm the trial court will be to penalize plaintiff, not for any dereliction on its part, but for that of the defendant and of those whom it represents in this case.

The discrimination resulted from the initial failure of the assessor and the tax commission to assess property in the county (other than that of the banks and public utilities) at the correct standard. This initial discrimination was followed by the failure of the county board of equalization at its September meeting to perform its public duty on its own initiative to correct the error.

The practice of under-assessing property other than that of public utilities had been persistently pursued for many years. To establish this point we need only excerpt from the majority opinion (referring to the Revenue Act of 1911) in *Colorado Tax Commission vs. Pitcher*, 56 Colo., 343, 376, the following:

All the statutes, adopted previous to this law, had proven inadequate to coerce the assessors to fix a *full cash value*, as required by law, upon the taxable property within the county. Moreover, they had likewise failed to place a relatively equal value upon the same class of property within their respective counties, and county commissioners and boards of equalization had not corrected the evil. (*Italics ours.*)

For 1912 taxation the Union Pacific Railway Company, as owner of a public utility, had been granted relief by this court in an opinion prepared by Mr. Justice Vandeventer. An injunction was then granted because of the doubt then existing regarding the opportunity to obtain redress in an action at law.

Union Pac. R. Co. *vs.* Weld County, 247 U. S., 282.

In that case it was not averred or true in fact that the railroad company had made any effort to induce the county board of equalization at its September meeting to raise the assessment of other property in the county to the scale of valuation at which railroad property had been assessed. That duty devolved upon the county board as a *public duty*. It was not required of the railway company during the assessing stage to go to the great expense and burden of examining the initial assessment of all other property in the county. Neither was it required of the banks in 1913 and in 1914.

Under statutes of Kentucky substantially the same as those of Colorado regarding the duties of the county board of equalization this court so held.

Greene *vs.* Louisville & Int. R. Co., 244 U. S., 499, 521.

In 1913, since the flat raise did not apply to utility companies, it corrected the initial failure of the assessor and county board of equalization to perform the public duty imposed on them so far as that class of taxpayers was concerned. Not so as to the banks. Their grievance and right to redress under section 5750, Rev. Stats. of 1908 (page 56, initial brief), was not corrected by the flat raise. On the

contrary, the initial injustice against the banks was emphasized thereby. The flat raise placing bank property in the county at 63 per cent above the correct standard made the initial gross injustice more manifest and conspicuous. Under these circumstances the right of the banks to relief under the equal-protection clause was just as manifest after the flat raise of 1913 as it had been without the flat raise in the case of the utility company for the fiscal year 1912.

Had there been no horizontal raise and had the levies been correspondingly greater, both the banks and the utility companies would have been in precisely the situation of the Sioux City Bridge Co., whose rights to equal protection were enforced by this court in an opinion prepared by Mr. Chief Justice Taft.

Sioux City Bridge Co. vs. Dakota Co., 67th Law Ed.,
220.

The result of the flat raise was to place all the taxable property in the county except that of the banks at a just and correct standard, but to place bank property 63 per cent higher in 1913 and 25 per cent higher in 1914 than its full cash value. Without judicial redress the banks are denied the equal protection of the laws. When the Supreme Court of Colorado, in its opinion in a case wherein one of the banks sought to enjoin collection of the excessive part of the tax of 1913, said:

"Plaintiff in error has not * * * suffered any wrong of which it can justly complain,"

if it intended to *hold* that an aggrieved bank in the county could not obtain redress in an action at law after paying under protest, said holding, rendered years after these causes

of action accrued, is not controlling on this court even on a question of State law. Manifestly it does not affect the constitutional right of this plaintiff to prevent a State denying it the equal protection of the laws under the Fourteenth Amendment. Judge Carland conceded this when he said:

Of course the opinion of the Supreme Court of Colorado upon a question arising under the Constitution of the United States would not be binding upon this court, but * * * the case must be a clear one which will authorize this court to disagree with a State court.

Printed Record, page 41.

We submit no clearer case was ever presented to this court.

Opposing counsel and the trial court lay undue stress on one or two inept phrases, *arguendo*, in the opinion of the Colorado Supreme Court in *Bank vs. Patterson*, 65 Colo., 166, 172-3. Taken as a whole, the only matter then *decided* was, not that the aggrieved bank was without remedy in any form, but only that its method of redress was to pay the challenged part of the tax and then sue at law to recover. (See excerpts from that opinion at page 35 of our initial brief.)

That court so held without equivocation in a case precisely similar.

Kendrick vs. Mining Co., 63 Colo., 214.

Moreover, in another case where relief at law was granted an aggrieved taxpayer under section 5750, Rev. Stats. of 1908, the court says:

Recovery is sought in this case under a specific and *unqualified* statute commanding a refund by the

county of every erroneous or illegal tax paid. (*Italics ours.*)

Spaulding Mfg. Co. *vs.* La Plata County, 63 Colo., 438, 440.

Certainly by using one or two careless phrases found *arguendo* in its opinion in the Patterson case the court could not have intended to render unnecessary everything else in the same opinion as well as its *decision* at the close thereof and to overrule, without referring to them, the two cases just above cited. All these cases reached judgment in the Colorado Supreme Court after the cause of action now sued on had accrued. No case prior thereto has been or can be cited wherein the right of redress under section 5750 has been qualified, as counsel claim it was, by said expressions in the Patterson case.

That it was never intended by the Colorado legislation of 1911 and 1913, to permit any taxpayer to be assessed at more than the full cash value of his property is shown by repeated expressions of the Supreme Court of the State in the majority opinion in

Colorado Tax Commission *vs.* Pitcher, 56 Colo., 343.

We excerpt therefrom (*italics ours*):

At page 350:

There is no constitutional requirement that taxes be levied under a plan which shall secure a full valuation, and therefore a valuation, however low, which is *equal and uniform*, is a just valuation and meets the constitutional requirement.

At page 351:

It may become of imperative necessity to the very existence of the State government and its institutions that property be assessed *according to its full cash value*, and unless there be a constitutional inhibition, it lies within the power of the general assembly to provide a plan necessary in its opinion to effectuate that result.

At page 362:

Bearing in mind * * * the necessity for uniformity and the constitutional mandate that taxes shall be levied under a plan which shall secure a *just valuation* for the purposes of taxation, it would seem that there should be no doubt as to the power of the general assembly to create a central body and empower it with the duty of performing those functions of assessment in each county, essential to bringing the property therein for taxation purposes to its *full cash value*, the standard by it prescribed to insure a just valuation.

At page 364 there is copied with approval the following from a brief filed in another case by former Judge Elliott of the Colorado Supreme Court:

We do not doubt * * * the power of the legislature to pass general laws which shall be effectual to secure "a just valuation for taxation of all property real and personal," even though the result might be the increasing of the average valuation of the county assessors.

At page 379:

Accordingly it became manifest that *full cash value* is the only standard that is *just and uniform*, and

whereby each citizen can be required to contribute to support the Government according to the value of his property. For, so long as the prevailing practice of assessing property in different localities at figures varying from 25 per cent to 100 per cent of its cash value, there will be gross inequalities in distribution of the tax burden.

At pages 378-9:

It is perhaps true that in any change from one system to another some injustice and hardship will, for the time being, be imposed in certain cases. But unless the standard which is provided by law, the *full cash value*, thus the just value demanded by the Constitution, be enforced, the same unfortunate, unequal, and unjust conditions which have heretofore existed in this State will continue indefinitely.

It is worthy of notice that one of the three dissenting judges in said Pitcher case called attention to the injustice of a flat raise on money already assessed at its face value.

At page 428, dissenting, Justice Gabbert says:

From the nature of things, the State Board cannot change the valuation of money on the assessment roll already assessed at its legal value and thereby make it cease to conform to the mandate of the Constitution.

The fallacy of this portion of the dissent as an attack upon the statutory plan of authorizing a flat raise to reach the correct standard, as well as the implication in the majority opinion at pages 378-9 (quoted *supra*), is that any such incidental hardships can be corrected by refund pursuant to section 5750, Rev. Stats. 1908.

The *legislation* of 1911 and 1913, retaining section 5750 to afford judicial relief against abuse and injustice, is therefore not obnoxious to the Federal Constitution. The *practice* pursued under those statutes by State and county officials has denied to plaintiff the equal protection of the laws.

Pages 16-24 of defendant's brief are devoted to the subject of the equal protection of the laws. An attempt is there made to argue that there was no *arbitrary discrimination* against the banks intended by the Commission in making the flat raise. That there was a very noticeable and unjust discrimination is not open to question here. The arbitrary discrimination grew out of the initial failure of the assessor, County Board of Equalization, and Tax Commission to see that other property in the county was initially assessed at the correct standard. The flat raise including banks and excluding utilities magnified the wrong as to the banks.

All the banks in the county in the spring of 1914 applied for a rebate of the 63 per cent excess tax, in strict conformity with the requirements of section 5, page 528, Session Laws of 1913 (pp. 64-5 former brief), by a verified petition setting forth the same facts as stated in the amended complaint. The assessor and the county board (defendant), pursuant to that section, recommended that the prayer of the petition be granted. The Tax Commission interposed its veto without giving any reason therefor, though said statute called, in event of a veto, for "a statement of their reasons therefor."

Printed Record, page 21.

Do not these facts admitted by the demurrer justify the assertion in the pleading?

By virtue of the premises, said the Colorado Tax Commission made a systematic, intentional and ar-

bitrary discrimination against plaintiff and the other banks of said Weld County by refusing to afford them relief against excessive illegal and unjust burden of taxation.

Cases Cited by Defendant on Topic of Arbitrary Discrimination.

Shaffer vs. Carter, 252 U. S., 37, concerned a tax on annual gross production of gas and oil mining leases in Oklahoma, in lieu of the usual *ad valorem* tax on other property. This was held not to involve an implied repeal of the State income tax on said property. Because of the peculiar nature of such gas and oil leases, the court held the method pursued was not arbitrary.

In said case was cited the case we next consider, *St. Louis Southwestern R. Co. vs. Arkansas*, 235 U. S., 350. *There* the syllabus states:

While this court is concluded as to the mere construction of a State statute by a decision of the highest court of the State, it is not concluded by the State court's characterization of the scheme of taxation in determining whether it deprives a party of rights secured under the Federal Constitution.

In determining the nature of a State tax, this Court must regard substance rather than form, and the controlling test is found in the *operation* and effect of the statute *as applied* and in force. (Italics ours.)

That case pertained to a franchise tax on a railroad, based on its intrastate business. The court on the *evidence* adduced, held, no arbitrary discrimination, if any wrong was shown.

Coulter vs. Louisville & N. R. Co., 196 U. S., 599, is cited

at page 16 of defendant's brief. *There* a railroad company, by bill in equity, sought to have its tax reduced by applying the levies to 80 per cent of its actual value. Its contention was based on its traversed allegation that all other property in the county was assessed at only 80 per cent of its true value. *Held*, the *evidence* did not support said allegation. Members of the assessing board explained that in taking 80 per cent of prices on a few reported sales of land belonging to other taxpayers, they were guided by the view that such accidental sales constituted an uncertain and misleading guide as to average values of land in the county.

The excerpt from this case in defendant's brief should be considered with its context. Referring to said testimony of members of the assessing board, this court says:

It would be going very far to assume that they were committing perjury because, to another mind, the sales seemed more significant and the explanations not very good. Inequality, we repeat, is nothing unless it was in pursuance of a scheme.

Defendant copies into its brief only the last sentence of said excerpt.

Applying said words to the case now at bar, the scheme adopted to bring property in the county up to the true standard, worked an injustice to the banks previously correctly assessed by raising them 63 per cent above such standard. Such injustice, which arose from a well-intended scheme, gave the banks a right to petition for rebate of the unjust excess and after the Commission's veto, to pay under protest and then proceed under section 5750, to obtain a judicial finding and judgment for refund of the excess complained of.

C. B. & Q. R. Co. *vs.* Babcock, 204 U. S., 585, is also cited at page 16 of defendant's brief. Syllabus 4 thereof reads:

In a suit of this nature [an equity case challenging an assessment] this court will not consider complaints as to results reached by the State board of assessors except those based on fraud *or the clear adoption of a fundamentally wrong principle.* [Italics ours.]

In the case now at bar, raising the banks 63 per cent above the true standard, leaving the public utilities as previously assessed and raising all other taxable property only to the correct standard, *as to the banks* was tantamount to adopting a fundamentally wrong principle.

Southern Ry. Co. *vs.* Walsh, 67 I. Ed., 199, is also cited by defendant to aid its contention. Special attention is directed to that part of the opinion prepared by Mr. Justice Brandeis at 1st column, page 203. The cases just considered are there cited. *Evidence* is referred to which rebutted the railroad company's claim of intentional and systematic undervaluation of their property. It is then said:

Plaintiffs have failed, likewise, in showing systematic refusal on the part of the State board to allow a proper reduction in the valuation of any railroad.

In the present case the Commission's veto without stating any reason, when the facts showing the injustice to the banks due to the horizontal raise was before it on verified petition, does show a systematic and intentional refusal to allow a proper reduction in the unjustly raised valuation of the property of each and every bank in Weld County.

Sunday Lake Iron Co. *vs.* Wakefield, 247 U. S., 350, is also cited by defendant. In the opinion prepared by Mr.

Justice McReynolds the evidence was considered and regarded as failing to justify the conclusion of design of Michigan State officials to discriminate. If upon facts admitted by the demurrer, it be supposed here for purpose of argument only that when the 1913 63 per cent horizontal raise was ordered, there was no intention to discriminate against the banks (though the Commission had prior full control of the assessor under the Act of 1913), the design to discriminate was manifest when the Commission vetoed the petition for rebate arbitrarily and without stating the reason as called for by the statute. Moreover, the horizontal raise in 1914, after the Commission must have been fully advised of the injustice to the banks, is further evidence of intention and design to discriminate.

II.

Due Process of Law.

We concede the law requires as condition to judicial relief that effort to obtain administrative relief must precede resort to the courts. Further that lack of notice during the assessing stage does not of itself constitute lack of due process when injustice does not result from such lack of notice. This doctrine is lucidly announced by this court in two opinions prepared by Mr. Justice Miller,

McMillan vs. Anderson, 95 U. S., 37.

Davidson vs. New Orleans, 96 U. S., 97, 104-5.

But said cases show when the assessing officials have done grave injustice the courts are open for redress. *At law*, if the State statutes so provide, otherwise *in equity*.

At page 42 of 95 U. S., it is said:

It is probable that in that State (Louisiana), as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party, and recover back the money so paid as paid under duress, if the tax was illegal. But, however that may be, it is quite certain that he can, if he was wrongfully taxed, stay the proceeding by process of injunction.

In *Davidson vs. New Orleans*, at pages 104-5 of 96 U. S., it is said:

Whenever, * * * by the laws of a State, a tax is imposed * * * and * * * those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding with regard to the property, as is appropriate to the nature of the case the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law.

Now in Colorado we have a statute on which this suit is founded, providing for redress by action at law after paying under protest. A judicial *finding* of the error or injustice of the tax was required because of the effect of section 5, page 528, Session Laws of 1913, where as in this case the Tax Commission had vetoed the rebate petitioned for.

The statute is unqualified. It is referred to as the proper remedy in the Patterson case. Yet the trial court denies us that remedy because of a *dictum* in the Patterson case in rehearing opinion handed down in December, 1918, to the effect that it was incumbent on the back to seek relief before the County Board of Equalization or the Tax Commission before the horizontal raise was imposed.

Never before the causes of action sued on had accrued had such a construction or limitation been announced as against section 5750. It is not in line with due process to expect the banks to ask the County Board to perform its *public duty* to raise the assessment of other property. The bank could not have anticipated in advance of the flat raise, that the Tax Commission would not exercise its public duty to see that other property in the county was duly assessed without raising assessment of the banks to 163 per cent in 1913, and 125 per cent in 1914.

The flat raise was recommended by the Commission one day in October and confirmed by the State Board of Equalization the next day. How could the banks in Weld County or the mining companies in another county have due process to be heard, to present evidence or to file briefs? Due process requires an opportunity to be heard and to make an argument, to file briefs and at some stage to have a judicial remedy against gross injustice.

Londoner *vs.* Denver, 210 U. S., 373, 386 reversing the Colorado Supreme Court.

Moreover, said *dictum* in the Patterson Case was directly contrary to repeated decisions of the Colorado Supreme Court in numerous cases prior to the Acts of 1911 and 1913.

See cases at page 10 in former brief.

A *dictum, arguendo*, in an opinion handed down years after these causes of action accrued does not control this court when we seek the very remedy to which we are relegated by other parts of the same opinion.

Due process of Law, within the meaning of the Federal Constitution, means a trial in which the rights of the parties

shall be decided by a tribunal appointed by law and governed by rules of law *previously established* (italics ours).

Kilbourn *vs.* Thompson, 103 U. S., 168, 182. In view of the decisions of the highest court of Colorado in Breese *vs.* Haley, 10 Colo., 5—see page 12 —, in Kendrick *vs.* Mining Co., 63 Colo., 214, and in Spaulding Mfg. Co. *vs.* La Plata Co., 63 Colo., 438 (none of which are overruled in the Patterson Case), we can reach no other conclusion than that the *dicta* on which our opponents rely were not intended to control the lower courts of the State when, after paying under protest, actions at law were instituted under the statute and procedure to which plaintiff was relegated by the decision of the Court at close of its opinion.

III.

Action not Prematurely Brought.

Opposing Counsel refer to Section 1220 Rev. Statutes of Colorado, 1908 (Comp. Laws of 1921, Sec. 8697)—See page 57 our initial brief.

Their contention, though made in trial court, was not mentioned in the opinion of either of Judge Carland or of Judge Symes.

The statute plainly refers to ordinary claims against a county—not to a statutory proceeding in which the county board is made the representative of all the tax levying agencies. Moreover, the amended complaint was filed months after the defendant had ample time to pass on the petition for refund filed as required by said statute. Failure to act under such circumstances is tantamount to rejection of the claim.

Still further in view of the Commission's prior veto of the requested rebate and the opinion of the court in the Patterson Case requiring a judicial finding before the county was at liberty to act, the need of waiting for action by the County Board, suggested in the cases cited, was obviated.

We respectfully submit the judgment of the trial court should be reversed with costs.

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